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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 781

JOHN PATTON, HAROLD CONANT, AND JACK BAKER

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED MARCH 25, 1929

(34,090)

(34,090)

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

JANUARY, A. D. 1929, Term

No. 8177

JOHN PATTON, HAROLD CONANT, and JACK BAKER, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error

In Error to the District Court of the United States for the Western District of Oklahoma

Mr. Claude Nowlin and Mr. M. M. Thomas (Mr. J. R. Spielman was with them on the brief) for plaintiffs in error.

Mr. Roy St. Lewis, United States Attorney (Mr. Fred A. Wagoner and Mr. William P. Kelley were with him on the brief), for defendant in error.

Before Kenyon, Circuit Judge, and Faris and Sanborn, District Judges

STATEMENT OF CASE

The United States Circuit Court of Appeals hereby certifies that a record on a writ of error now pending before it discloses the following:

Plaintiffs in error, John Patton, Harold Conant and Jack Baker were with others indicted in the District Court of the United States for the Western District of Oklahoma, charged in Count 1 of the indictment with a conspiracy to violate section 39 of the Penal Code by an arrangement whereby large sums of money were to be paid to one Charles Buzzi, an officer of the United States, to-wit, a federal prohibition agent, acting for and on behalf of the United States in an official function, to influence his action and to cause him in violation of his lawful duty to omit to investigate and arrest said defendants for violation of the

National Prohibition Act and to omit to make report [fol. 2] thereof to his superior officer. Each of the other seven counts of the indictment charged payment of $500.00 at different times to said Charles Buzzi as said prohibition agent to influence his action in a matter and investigation then pending before him in his official capacity with intent to induce him to omit to investigate and arrest defendants for violation of the National Prohibition Act and to omit to make report thereof to his superior officers. Other defendants indicted with Patton, Conant and Baker were acquitted, but each of these defendants was convicted on each of the eight counts of the indictment and sentenced to terms in the penitentiary.

The trial commenced on October 19, 1927, before a jury of twelve men duly and lawfully selected. It continued before said jury of twelve men up to October 26, 1927, when one of the jurors became so severely ill that he was unable to serve further as a juror, and it was stipulated in open court by the Government and by counsel for the defendants that the trial should proceed with eleven jurors. The trial was concluded on October 27th and a verdict returned on that date. At the time the stipulation to proceed with eleven jurors was made the evidence in chief of the Government had been introduced and likewise most of the evidence on the part of defendants. Rebuttal evidence on the part of the Government was introduced after said time.

The proceedings in court at the time that the agreement was entered into between the Government's representative and defendants' counsel that the trial should proceed to a finality before the remaining eleven jurors are here set forth in full.

"Proceedings

October 26, 1927.

The Court: Gentlemen, the report this morning is that the juror is very ill and has to be taken to the hospital and there is no question of his not being able to be here. He can't be here.

Mr. Nowlin: May I ask the court? I am not sure whether the defendants in this character of case could waive the question as to the number of jurors and try the

case to eleven jurors or not, but, I will state to the Court that I have personally conferred with all of counsel in the case and with each of the defendants individually, and it is our desire to try this case to the remainder of this jury if the defendants can waive their rights. I am not sure. [fol. 3] Your Honor knows the law on that, and I am not prepared to say whether it can be done or not, but if it can be done we desire to try this case to these eleven jurors.

The Court: Where is the United States Attorney? I have just announced that the sick juror is unable to continue his service at the trial. He is very ill and had to be taken to the hospital with no prospects of his coming out of the hospital in a short time. You haven't heard what the defendants' counsel said.

Mr. Salter: I didn't hear his statement.

The Court: He proposes to waive the absence of one juror and try it to eleven men.

Mr. Salter: That is agreeable to the Government.

The Court: Have you looked the matter up?

Mr. Salter: As I understand the law the defendants can waive their constitutional rights, to the right of a trial by a jury of twelve men in any case except a capital offense. I understand the Supreme Court of the United States has passed on it. If the Court desires to be positive I can look up the authority within a few minutes time and present it to the Court. I understand that to be the law and I see no reason why it isn't good law.

Mr. Nowlin: We will accept it as the law of this case. I make that statement in so far as counsel ethically can do it. I am assuming that is the law; I don't know. I am assuming that is the law and we are anxious to proceed with the trial. We have been here a week now and we would like to finish the trial and we are satisfied to try the case with eleven men as well as twelve.

The Court: That is satisfactory if you gentlemen on both sides are agreed to it, and finish up this case. Make up the record then.

Mr. Salter: I would request that each defendant personally waive his constitutional right and consent that the trial might proceed if they desire to do it. They don't have to do it.

The Court: No, the defendants and the Government both are entitled to a constitutional jury of twelve men, and this would be a mis-trial and require a new trial, the absence of one juror unless both sides would waive all objections to a trial before the remaining eleven jurors and agree to it. Make this record then gentlemen, if you want to go ahead.

Now at the convening of court on this October 26, 1927, at nine fifteen A. M. it is made to appear to the court upon due proof that the juror, N. M. Harris, is seriously ill and has been taken to the hospital for treatment and cannot be present at the further trial of the case. It is agreed in open court by counsel for the Government and counsel for all the defendants, the defendants personally assenting that the trial proceed to a finality before the remaining eleven jurors, and all objections thereto are waived to further proceedings as if there were twelve jurors in the box are waived. Is that satisfactory to all the defendants and their counsel.

Mr. Collins: That is correct."

[fol. 4] From the assignments of error we set forth numbers 4 and 42:

"IV

For the reason that during the trial of this case one of the jurors, to-wit: one N. M. Harris, became ill and unable to continue with the trial of the case, and thereupon the defendants and the Government agreed in so far as defendants could waive their constitutional rights to trial by a jury of twelve, they would waive said rights and try the case to the remaining eleven jurors and thereupon the trial proceeded with eleven jurors and without juror Harris participating therein and the verdict returned in this case was a verdict by eleven jurors and was not concurred in or participated in by the juror Harris.

Defendants specifically admit that they, in good faith, attempted to waive and in so far as they had power to waive did waive their constitutional right to have this case decided by a full jury of twelve men. However, defendants are now in doubt as to their power to waive their trial—for the offense charged against them—by a full jury of twelve men and state that if they had power to waive said

right, then the same was waived, but if on the other hand, they had no power to waive said right, then the same could not be waived and the verdict is a nullity and is insufficient to sustain a sentence or judgment of conviction."

"42

The trial court erred in overruling the separate motions of these defendants in arrest of judgment in this case which set out specifically that these defendants had no power to waive their constitutional right of trial by a jury of twelve men and which set out specifically that the consideration of this case was by stipulation considered by eleven jurors only and the verdict returned by eleven jurors only, the twelfth juror, M. H. Harris, having been excused during the progress of the trial on account of illness, and defendants waived their right in so far as they had the power to waive same to insist on a trial by twelve men but said motion showing the lack of power of the defendant- to so stipulate, to which ruling the defendants and each of them excepted at the time."

Plaintiffs in error by these assignments now take the position that a jury of twelve jurors was necessary throughout the entire trial of the case and that they had no power to waive the same, relying on Thompson v. Utah, 170 U. S. 343; Capital Traction Co. v. Hof, 174 U. S. 1: Schick v. United States, 195 U. S. 65; Rassmussen v. United States, 197 U. S. 516; Low et al. v. United States, 169 F. 86; Freeman v. United States, 227 F. 732; Queenan v. Territory (Okl.) 71 Pac. 219.

The Government contends that as the trial had commenced with twelve jurors and had proceeded nearly to its conclusion before the juror was taken too ill to continue in the trial, and in view of the insistence of defendants' counsel that the case continue, that defendants waived the right to have a jury of twelve men throughout the entire trial, and relies on Commonwealth v. Dailey & Another, 12 Cush-[fol. 5] ing 80; Queenan v. Oklahoma, 190 U. S. 548; Grove v. United States, 3 F. (2d) 965; Dickinson v. United States (dissenting opinion by Judge Aldrich), 159 Fed. 801, 812.

In view of the fact that the case was commenced with a proper constitutional jury of twelve men and so proceeded

for nearly seven days and that upon the juror becoming ill defendants through their counsel evidenced their desire to proceed with the trial, and personally assented that the trial should proceed to a finality before the remaining eleven jurors as if twelve jurors were in the box, and in view of the general holdings of the courts that such constitutional rights for the protection of a defendant as a speedy trial, to be confronted with the witnesses against him and to have the assistance of counsel can be waived, we are in doubt as to the law applicable to the situation here presented, and so desire the instruction of the Supreme Court upon the following question, the decision of which is deemed indispensable to a proper determination of the case now before it:

QUESTION CERTIFIED

Question. After the commencement of a trial in a Federal Court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government through its official representative in charge of the case consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?

Wm. S. Kenyon, United States Circuit Judge; W. B. Faris, United States District Judge; John N. D. Sanborn, United States District Judge, the Judges who sat in the Circuit Court of Appeals in the hearing of the case.

[fol. 6] Clerk's certificate to foregoing omitted in printing.

Endorsed on cover: File No. 34,090. United States Circuit Court of Appeals, Eighth Circuit. Term No. 781. John Patton, Harold Conant, and Jack Baker vs. The United States of America. (Certificate.) Filed March 25th, 1929. File No. 34,090.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

JOHN PATTON, HAROLD CONANT AND JACK BAKER,

VS.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANTS, JOHN PATTON, HAROLD CONANT AND JACK BAKER.

CLAUDE NOWLIN,
JACOB R. SPIELMAN,
M. M. THOMAS,
Attorneys for the Appellants, John Patton, Harold Conant and Jack Baker.

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I.

QUESTION CERTIFIED BY THE CIRCUIT COURT OF APPEALS TO THE SUPREME COURT OF THE UNITED STATES.

"After the commencement of a trial in a Federal Court, before a jury of twelve men upon an indictment charging a crime punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government, through its official representative in charge of the case, consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?"

II.

PROPOSITION OF LAW RELIED UPON BY APPELLANTS IN ANSWER TO THE QUESTION CERTIFIED.

Where defendants are tried in the United States District Court for a felony upon their plea of not guilty, the jurisdiction of the court to pronounce judgment of conviction and sentence upon them rests upon a unanimous verdict of guilty duly returned by a constitutional jury of twelve, and no agreement between the representative of the Government and the defendants and their counsel can change the tribunal provided by the Constitution so as to confer jurisdiction upon the court to pronounce judgment and sentence upon a finding of guilty by eleven jurors.

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No. 781.

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BRIEF OF APPELLANTS, JOHN PATTON, HAROLD CONANT AND JACK BAKER.

STATEMENT.

Appellants were sentenced by the United States District Court for the Western District of Oklahoma to twenty-three years imprisonment, together with certain fines assessed against them, for violation of the con-

spiracy statute and certain violations of Section 39 of the Penal Code. Sentences were made to run concurrently so that the total period of imprisonment assessed against each appellant is eight years.

For convenience permit us to refer to these appellants as defendants as they appeared in the trial court.

Concretely, the certified question, stated in a little different language from the language of the Circuit Court of Appeals, is whether or not the District Court could lawfully impose a sentence of imprisonment in the federal penitentiary upon the defendants, where the defendants plead not guilty to the felony charged against them and were found guilty by a purported verdict returned by eleven jurors, the twelfth juror having been excused during the progress of the trial by the consent of the defendants and the government and the trial proceeding to the remaining eleven men as a jury by agreement between the defendants, their counsel and counsel representing the government.

Defendants did not have an opportunity to orally argue this question to the Circuit Court of Appeals. When counsel for defendants stated the question, the Circuit Court of Appeals stated to counsel that it would not be necessary for counsel to present this question as they desired to hear from the United States Attorney upon that feature of the case. However, counsel for defendants, of course, filed their brief with the Circuit Court of Appeals, as did counsel for the government.

The Circuit Court of Appeals says in its statement of the case that the government relies upon certain

cases. In the brief filed by the government before the Circuit Court of Appeals no authority whatever was cited or relied upon in support of the government's position. At the oral argument before the Circuit Court of Appeals, counsel for the government read to the Circuit Court of Appeals from the dissenting opinion of Judge Aldrich in the case of *Dickinson* v. *United States.* No other authority has ever been cited by the government to the knowledge of the defendants.

We desire briefly to present our views of the law governing the certified question and the authorities which we conceive support these views.

BRIEF AND ARGUMENT.

The certified question, reciting the circumstances, asks whether defendants can thus waive the right to trial and verdict by a constitutional jury of twelve men. We conceive the question to be somewhat broader, in view of the statement of the case. There was not only a waiver by the defendants, if a waiver could be made, but there was a waiver by the government and the result of the combined waivers of the government's representative and the defendants, was to create a tribunal to try the issue of guilty or not guilty of an infamous crime by a differently constituted body than that prescribed for the trial of such issue by the federal constitution.

Therefore, we think, broadly speaking, the question presented is whether or not the agreement by the representative of the government with the defendants and their counsel, can create a body unknown to the law and unknown to the constitution, to sit in lieu of a jury and determine the issue of guilt or innocence of a felony and whether the finding of such a tribunal, so created, is sufficient authority for the Federal District Judge to impose punishment of imprisonment in the penitentiary upon the defendants.

We desire first to direct the attention of the court to the case of *Thompson* v. *State of Utah,* 170 U. S. 343, 42 L. Ed. 1061. The syllabus as reported in the Law Edition, contains two pertinent paragraphs which we quote:

"The jury referred to in the Federal Constitution and in the Sixth Amendment thereto is a jury constituted, as it was at common law, of twelve persons, neither more nor less.

"It is not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt, instead of the constitutional jury of twelve."

The opinion of the court is by Mr. Justice Harlan. The defendant was indicted in the Territory of Utah in May, 1895, charged with the crime of grand larceny, to-wit: the theft of an animal. The case was first tried when Utah was a territory and by a jury composed of twelve persons. The defendant was convicted. A new trial was granted and change of venue allowed. But the second trial did not take place until after the admission of Utah into the Union as a State. At the second trial the defendant was convicted and moved for a new trial upon the ground, among others, that the jury that tried him was composed of only eight jurors, whereas, by the law in force at the time of the commission of the alleged offense, a lawful jury, in a felony case, could not be composed of less than twelve jurors. The motions for new trial and in arrest of judgment were overruled and the defendant sentenced to three years in prison. The judgment of conviction was affirmed by the Supreme Court of Utah and writ of error brought the case to the United States Supreme Court. The Supreme Court of the United States reversed the conviction upon the point stated. In the opinion Justice Harlan says:

"The Constitution of the United States provides: 'The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as Congress may by law have directed.' Art. 3, Sec. 2. And by the Sixth Amendment of the Constitution it is declared: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.'"

The court then proceeds to hold that the provisions of the Constitution of the United States relating to right of trial by jury in suits at common law, apply to the Territories of the United States, saying that is no longer an open question, and citing cases, and then states:

"Assuming, then, that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161, 1 Chitty, Crim. L. 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of his life, etc, 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those

who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power.' 2 Story, Const. Sec. 1779. In Bacon's Abridgment, tit. Juries, it is said: 'The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale's P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva roce* in the presence of the judge and jury, and by the inspection and direction of the judge.' It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the Territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory."

The court then proceeds to hold that under the circumstances, the defendant Thompson was entitled to be tried to a jury of twelve persons and that the

verdict of eight jurors did not constitute a verdict upon which sentence could be pronounced.

Then the court discusses the question of the alleged waiver of the defendant of his right to the constitutional jury and says:

> "It is stated that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore, he should not be heard to say that his trial by such a jury was in violation of the constitutional rights. *It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty except one constituted of a court and a jury of twelve persons*" (italics ours).

In concluding the opinion, Mr. Justice Harlan said:

> "In our opinion the provisions of the Constitution of Utah providing for trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because in respect of such crime, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty, except by the unanimous verdict of such a jury."

In the case of *Maxwell* v. *Dow*, 176 U. S. 581, 44 L. E. 597, the opinion is by Mr. Justice Peckham and deals with the validity of the Utah state law providing for a jury of eight jurors in criminal cases not capital. The court there held that the provisions of the Sixth

Amendment to the Federal Constitution were not a limitation upon the powers of the state but were merely limitations upon the Federal Government and recognized the principles announced by the court in the case of *Thompson* v. *Utah*. The court said:

> "That a jury composed, as at common law, of twelve jurors, was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson* v. *Utah*, 170 U. S. 343-349. 42 L. E. 1061. 18 Sup. Ct. Rep. 620. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held" (citing cases).
>
> "It would seem to be quite plain that the provision in the Utah Constitution for a jury of eight jurors in all state criminal trials, for other than capital offenses, violates the Sixth Amendment, provided that the amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts."

In the case of *Low, et al.* v. *United States*, 169 Fed. 86, the Circuit Court of Appeals of the Sixth Circuit had before it the question of whether or not the defendant and the Government could agree to waive a jury and submit the evidence to the court under a plea of not guilty of an offense of violating certain sections of the United States statutes which involved various punishments, the maximum punishment being a fine and imprisonment from six months to two years.

The opinion of the Circuit Court of Appeals was written by Judge Lurton, subsequently a Justice of the Supreme Court of the United States. Judge Lurton there had occasion to distinguish between "crimes" and

"petty offenses" which, at common law, were triable without a jury, holding that such petty offenses were not "crimes" within the meaning of the Constitution, and therefore as to such offenses the defendant might waive a jury, citing *Schick* v. *United States*, 195 U. S. 65, 49 L. ed. 99. Referring then to the question as to whether the offenses charged were crimes within the meaning of the Constitution, Judge Lurton says:

> "That the indictments against the plaintiffs in error included offenses for which a term of imprisonment for more than one year might have been imposed is determinative of the fact that they were not 'petty offenses' such as might have been heard by a tribunal authorized by law to act without a jury, or such as might have been presented upon information and without presentment or indictment by a grand jury."

In reaching the conclusion that there was no power in the defendant and the attorney for the government agree to waive a jury and try the plea of not guilty to the court, Judge Lurton uses some language very pertinent to the issue presented in this case. We quote:

> "The suggestion that the effect of the Sixth Amendment is to modify the force and effect of the jury clause in the Third Article by converting a constitutional requirement into a privilege which an accused may exercise or not, as he may elect, is not tenable. It is based upon the verbiage of the amendment in its first line, to-wit: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,' etc. That amendment, as we historically know, originated in the earnest desire to secure, in a definite way, the common law procedure in criminal trials. Without unanswerable reasons it should not be construed as authorizing

so grave a change in the constitutional tribunal of trials as would result if trial by jury may be waived at the option of the accused. The plain purpose of that amendment was to declare those rights appurtenant to jury trial which had from ancient times surrounded an accused. The rights and privileges so declared, says Judge Story, in his Commentaries on the Constitution, Sec. 1791, 'do but follow the established course of the common law.' The accused is not only to 'enjoy' jury trial, but a speedy trial and a public trial, by an impartial jury of the locality, be confronted by the witnesses against him, have compulsory process for his own witnesses, and, finally, the right to be assisted by counsel. The court in *Callan* v. *Wilson*, said:

" 'We do not think that the amendment was intended to supplant that part of the Third Article which relates to trial by jury. There is no necessary conflict between them.' "

Again, the court said:

" 'And as the guaranty of a trial by jury, in the Third Article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property.'

"*The right to waive a right does not exist when the matter concerns the public as well as the individual. Thus, the waiver of the trial of a crime by jury involves the setting on one side of the tribunal constituted by law for that purpose and the substitution by consent of one unknown to the*

law. It is not competent for the accused and the district attorney to change by consent the constitution of the tribunal provided for the trial of crimes. Between the waiver of a jury in a civil case and its waiver in a trial for crime, there are fundamental differences. The one involves only property rights of the parties, rights over which they have dominion. The other involves the liberty or life of a citizen. This is a matter over which the accused has no dominion. The state, the public, are concerned that neither shall be affected save by due process of law. A crime is a 'breach of public rights and duties,' which, says Blackstone, affect 'the whole community, in its social and aggregate capacity.' 3 Black. Comm. 2, 4 and 5. 'The end they have in view is the prevention of similar offenses, not atonement or expiation of crimes committed. The penalties or punishments for the enforcement of which they are means to the end, are not within the discretion or control of the parties accused; for no one has a right by his own voluntary act to surrender his liberty or part with his life.' *Caucemi* v. *People*, 18 N. Y. 128, 137. *Undoubtedly the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void.*

"It is accordingly ordered that the judgments in this case be set aside and the case remanded with direction to award a new trial" (italics ours).

In the case of *Frank, et al.* v. *United States*, 192 Fed. 864, the Circuit Court of Appeals of the Sixth

Circuit again reviewed the question of whether or not a person accused of crime might waive his right to trial by jury. The court there held again that a trial by the constitutional jury was required if the offense was a "crime" instead of a "petty offense." In the Frank case the court found that the charge was merely a petty offense in view of the fact that it was punishable by fine not exceeding $200.00 with no provision for imprisonment. In discussing the legal questions, the Circuit Court of Appeals, speaking through Judge Knappen, says:

> "The result is that if the offense for which the defendants were tried amounts to a crime, as distinguished from a 'petty offense,' it could under Section 2 of Article 3 of the Constitution of the United States, be tried only by a jury; and, if not so tried, the judgment would be a nullity and require reversal. On the other hand, if the offense is merely a 'petty offense,' the trial under waiver of jury would amount to an arbitration as to the questions of fact involved; and it would result that the court's conclusions of fact could not be reviewed here, and we would have no power to inquire into the sufficiency of the evidence to support the conviction, nor any question of law arising out of or upon the evidence."

It will be noted that the courts, in discussing cases where the constitutional jury of twelve is not required by the mandatory language of the Constitution, because the offense is a "petty offense," instead of a crime, considers that the waiver of a jury and the submission of the matter to the court is an *arbitration* of the issue of the guilt of defendant of the petty offense charged, and hold that wherever it is within the

power of the parties to waive the machinery provided by law and submit the issue of the guilt of the petty offense charged, either to a judge as an arbitrator or to a jury differently composed than the jury required by the Constitutions, the findings are binding upon the appellate court as the findings of arbitrators, and the appellate court cannot review the sufficiency of the evidence to support such findings. In other words, the court applies the well-settled principle applicable to arbitration that calls into play the principles controlling contracts so that where parties agree that a certain issue may be determined by an arbitrator, they are thereby precluded from objecting to the sufficiency of the evidence to support the finding and award of the arbitrators.

In the case of *Dickinson* v. *U. S.*, 159 Fed. 801, the Circuit Court of Appeals of the First Circuit had before it the question of the right of the accused and the representatives of the government to stipulate for the withdrawal of two jurors and the continuation of the trial to the remaining ten jurors. The charge was a misdemeanor, a violation of the banking laws, but the majority of the court construed the charge to be that of an infamous crime and treated it upon the same basis as a felony.

It appears that during the course of the trial which, as is indicated by comments of Judge Aldrich, was a trial that had been in process for almost three months, one of the jurors became ill and was unable to sit further. Thereupon a written agreement was made, signed by the defendants in person and by the United States

Attorney for the United States, wherein it was consented and agreed that the sick juror might be discharged and the further trial of the case proceed before the remaining eleven jurors with the same force and effect as if the juror had not been discharged.

Thereupon, the trial proceeded before the eleven jurors and subsequently, before the conclusion of the trial a death occurred in the family of one of the remaining eleven jurors, whereupon, a similar agreement was entered into between the defendants and the government, excusing this juror and agreeing to try the case to the remaining ten jurors with the same force and effect as if to the original twelve jurors. The ten jurors purported to return a verdict of guilty and a motion in arrest of judgment was filed by the defendants in which the attention of the court was called to the fact that there was no lawful verdict upon which sentence could be pronounced, because the verdict of the ten jurors was not the verdict of a jury within the meaning of the law and hence was void, and that no judgment and sentence should be pronounced upon it.

The trial court having overruled the motion in arrest of judgment the case was taken to the Circuit Court or Appeals. Circuit Judge Putnam delivered the opinion which was concurred in by District Judge Brown and from which opinion District Judge Aldrich dissented.

We quote from the syllabus:

> "While a person accused of an infamous crime, though not a felony, may waive the disqualification of jurors, or even their impartiality,

such person cannot waive his right to a trial by a jury of 12 by consenting, after a legal jury had been impaneled and two had been excused, to continue the trial and abide by the verdict of the remaining 10."

In the opinion of the court, the second section of Article 3 of the Constitution of the United States was quoted as follows:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress by law may have directed."

The Fifth, Sixth and Seventh Amendments to the Constitution are quoted also, the Sixth Amendment reading:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The court, after determining that the nature of the offense, although a misdemeanor, was of such grade as to take it out of the class known as "petty offenses," and make it "an infamous crime" have this to say:

> "There is no question that it was settled law in England that, in a case of felony, the jury panel could not be weakened by waiver of the person

prosecuted. *Thompson* v. *Utah*, 170 U. S. 343, 353, 354, 18 Sup. Ct. 620, 42 L. Ed. 1061; *Queenan* v. *Oklahoma*, 190 U. S. 548, 551, 23 Sup. Ct. 762, 47 L. Ed. 1175. But with regard to misdemeanors, we have made a very diligent search, and find no pronounced practice prior to the Constitution in the English courts or elsewhere with reference to like waivers."

The court then proceeded to consider certain state decisions and quotes from Chief Justice Cooley the following language:

> "The infirmity in case of a trial by jury of less than twelve by consent would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be requiring to submit to a species of arbitration the question whether the accused has been guilty of an offense against the State."
>
> Cooley's Constitutional Limitations (7th Ed. 1903) 458, 459.

The court continues:

> "The learned jurist, in stating the direct proposition that a full panel could not be waived even by consent, adds: 'at least in case of felony.' But the principle he lays down covers every criminal proceeding where by the Constitution a common law jury is required. What we have attributed to him is quoted from the seventh edition of his Constitutional Limitations, but the same will be found in the edition of 1896, which is the last published during his lifetime. Thus it appears that he reached the result stated at the end of thirty years study and reflection."

The court then refers to the contrary decision by Chief Justice Shaw of Massachusetts, as reflected in the case of *Commonwealth* v. *Daily*, 12 Cushing, 80 where

Chief Justice Shaw, after expressing the conviction that the full jury might be waived, makes this statement:

> "But it is asked, if consent will authorize a trial before eleven jurors, why not before ten or six or one. It appears to us that it is a good answer to say that no departure from established forms of trial in criminal cases can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from these salutary forms as the question supposes, nor any departure, unless upon some unforeseen or urgent exigency."

Speaking of this expression by Justice Shaw, the Circuit Court of Appeals continues:

> "We have been unable to answer satisfactorily the question which he thus asked himself to determine, or to frame any satisfactory rule by which, if the waivers at bar can be sustained, the jury may not be made to consist of one man instead of twelve. The legal mind involuntarily rejects a proposition that the jury might be so constituted constitutionally; and yet we are unable to determine at what point the weakening of the panel should stop unless it might by consent be reduced to a single individual. Chief Justice Shaw likewise finds no solution except the discretion of the judge; but while, necessarily, the discretion of the judge is often interposed in administering the civil law, and, to a certain extent, the criminal law, it seems wholly inappropriate that it should be availed of in a matter of so grave a character as the construction and practical application of the Constitution of the United States. We are not able to accept a proposition of that kind."

The court then cites the case of *Queenan* v. *Oklahoma*, 190 U. S. 548, 551, 47 L. ed. 1175. That case was

a case that went up from Oklahoma Territory. Queenan was prosecuted for murder. During the progress of the trial the Government discovered that one of the jurors had been convicted of a felony in the State of Nebraska, although the juror had answered upon examination as to his qualifications that he had not been so convicted. The United States Attorney reported this discovery to the court and to defendant and his counsel. The court asked counsel for defendant what they wished to do about the matter. They remained silent or in effect indicated that they had nothing to say and the trial proceeded. After conviction the defendant sought to set aside the conviction on the ground of the disqualification of the juror as stated.

The distinction between such a situation and the situation presented by the case at bar which involved the reduction of the number of jurors below the constitutional number is very clearly drawn in the decision of the Oklahoma Territorial Court, and, we think, in the language of the Supreme Court of the United States in affirming such decision.

The decision of the Territorial Court is reported in 71 Pacific, page 218. The syllabus, written by the court, brings out clearly the distinction to which we call attention. We quote from the syllabus:

> "The provisions in the Constitution of the United States in relation to trials by jury for crimes, and to criminal prosecutions, apply to the Territories of the United States.
>
> "The jury, within the meaning of the Federal Constitution, and the Sixth Amendment thereto, is a jury constituted as it was at common law, of twelve persons—neither more nor less.

"A constitutional right cannot be waived by the defendant or his counsel in a felony case, but a statutory right may be waived. The right of the defendant to have a trial by a jury of twelve persons is a constitutional right, which the defendant cannot waive. It is not within the power of one accused of a felony, by consent expressly given or by his silence to authorize a jury of less than twelve persons to pass upon his guilt or innocence.

"At common law the fact that a juror was an alien, or that he had been convicted of a crime, were causes of challenge *propter defectum;* and there was no distinction at common law between a person who was convicted of a felony and one who was an alien. Most of the states of the Union have statutes which make such disqualifications of a juror a cause of challenge, and these statutes are but declaratory of the common law.

"Where one of the jurors in a trial for murder had been convicted of a felony, although cause of challenge *propter defectum*, it is not a denial of due process of law, or of the equal protection of the laws to the person convicted, within the meaning of the Federal Constitution.

"A known ground of disqualification to a juror, before or during the process of the trial, is waived by withholding it or refusing or declining to raise the objection until after verdict."

Commenting on the above, the Territorial Court emphatically says:

"It is not within the power of one accused of a felony, by consent expressly given or by his silence, to authorize a jury of less than twelve persons to pass upon his guilt or innocence,"

but at the same time the court holds in the Queenan case that the ordinary statutes for disqualifying from jury service an alien or a person convicted of felony,

were but declaratory of the common law, and holds that a known ground of disqualification to a juror before or during the progress of the trial is waived by withholding it or refusing or declining to raise the objection until after verdict.

In the opinion, the court cites the case of *Thompson* v. *Utah*, 170 U. S. 345, in support of the general principle as expressed by it:

> "And the jury referred to in the Federal Constitution and the Sixth Amendment thereto, is the jury constituted as it was at common law, of twelve persons—neither more nor less."

The decision of the Territorial Court is not referred to by the decision of the Circuit Court of Appeals in the Dickinson case, but the decision of the Supreme Court is referred to and quoted as follows:

> "The court asked the counsel for the prisoner what they desired to do and its intimation indicated that if the objection were pressed the juror would be excused. *This, of course, meant that the trial would have to be begun over again.* The counsel for the prisoner answered that they had nothing to say, and the trial went on. It is now argued that the defendant was deprived of a constitutional right which he could not waive. *Thompson* v. *Utah*, 170 U. S. 343, 18 Supt. Ct. 620, 42 L. ed. 1061. The contrary plainly is the law, as well for the Territories as for the States" (italics ours).

After quoting the above statement from the opinion of the United States Supreme Court, the Circuit Court of Appeals says:

> "This statement that, if the juror had been excused, the trial would have had to be begun over again makes an authoritative determination of a

distinction which applies as much to misdemeanors as to felonies, to the effect that it does not follow that, because objections to the qualifications of jurors can be waived, a reduction in their number can also be waived. Therefore, so far as this point is concerned, the United States can take no advantage."

The final conclusion of the Circuit Court of Appeals was, as stated in the quoted paragraph of the syllabus, that the verdict of the ten jurors was not a lawful verdict upon which sentence could be pronounced and the judgment and sentence was set aside and the case remanded to the trial court.

It is true that District Judge Aldrich dissented in the foregoing case, but a careful examination of his dissent indicates that he had two thoughts in mind. First, that the offense charged was of a grade of misdemeanor and not a felony. Second, he conceived the idea that if the trial started out with a sufficient number of jurors, to-wit: with twelve jurors, it might subsequently be depleted, although conceding the lack of jurisdiction if the trial had commenced with less than twelve jurors. In other words, the learned judge seemed to have the idea that if jurisdiction was attached by virtue of the impanelling of a constitutional jury of twelve, no subsequent happening in the case which might reduce the panel would prevent a verdict of the panel from being valid, and he particularly called attention to the long trial which had continued for almost three months, but, at page 823 of the Federal Reporter, the dissenting judge makes this statement:

"Upon the extreme proposition that an accused, in cases involving certain grades of felony,

> may waive his constitutional right and go to trial with less than twelve, as well as upon the less extreme proposition that he may waive the loss of a juror from a properly constituted tribunal, during the course of a felony trial, there is conflict, involving a field of discussion which we need not enter, because it is foreign to the question under consideration."

The above statement shows that even the dissenting opinion of the district judge in the Dickinson case was not intended to relate to a case like the case at bar where the indictment was for felony involving, as the sentence in this case exemplifies, a long period of penal servitude.

That the learned district judge in his dissenting opinion was in error in assuming that if a lawful jury was impaneled it continued to be a lawful jury although it was diminished below the constitutional number by stipulation during the trial, is shown by the decision of the Circuit Court of Appeals of the Second Circuit in the case of *Freeman* v. *United States*, 227 Fed. 732. The direct question involved in the Freeman case was as to whether or not a change in the trial judge could take place during the trial without making the subsequent proceedings void, although the change in the trial judge was made with the consent of the defendant and the government. The conclusion of the lengthy consideration of this case is found at pages 759-760, as follows:

> "It is the opinion of this court that in a criminal case trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning

to the end. It is not possible for either the government or the accused or both, to consent to a substitution either of one judge for another judge or of one juror for another juror. The continuous presence of the same judge and jury is actually essential throughout the whole of the trial."

The result, of course, was a reversal of the judgment.

The discussion offered in the opinion is interesting and is pertinent to the question before this court.

After disposing of the preliminary question on motion to dismiss the writ of error, the court takes up the merits of the case at page 741, and enters into a discussion of the constitutional provisions we have heretofore cited and goes back to the common law, stating:

"But by the time of the reign of Henry VII, Hallam says:

" 'The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offense occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made.' "

The Circuit Court of Appeals continues:

"The English-speaking people of the world over have this year (1915) commemorated the seven hundredth anniversary of the signing of Magna Charta. That instrument declared that no freeman should be deprived of life or liberty 'but by the judgment of his peers or by the law of the land,' and this has been expounded as referring to a trial of all persons by a jury of twelve men, although strictly speaking it is more likely that it referred to the trial of the barons by their peers. The Constitution of the United States as

originally adopted provides in the third article as follows:

"'The trial of all crimes, except in cases of impeachment, shall be by jury.'"

The court then deals with the first ten amendments to the Constitution which were proposed by the First Congress, and says:

"The defendant is accused of a crime for which he is entitled to trial by jury within the meaning of the Third Article of the Constitution of the United States. The Supreme Court in *Callan* v. *Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223, construed that article as embracing, not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanors, the punishment of which may involve the deprivation of the liberty of the citizen."

The court then cites the case of *Lamb* v. *Lane*, 4 Ohio St. 167-169, where in 1854, the court, after a careful examination of the subject:

"announced that it was clearly of the opinion that the word 'jury,' where it occurs in the state constitution, 'means a tribunal of twelve men, presided over by a court and hearing the allegations, evidence and arguments of the parties.' And the opinion was expressed that twelve men 'can never be properly regarded as a jury' unless presided over by a court and that a 'presiding law tribunal is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial.'"

The court then cites the case of *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, 19 Sup. Ct. 580, 585, 43 L. ed. 873, where the Supreme Court held that trial by jury in the primary and usual sense of the term, at

common law, is not merely a trial by jury of twelve men before an officer vested with authority, etc., but that it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them in the law and advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence. The Supreme Court of the United States is quoted as saying:

> "This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

Continuing, the Circuit Court says:

> "As the Constitution specifically declares that 'the trial of all crimes * * * *shall be by jury*' it is difficult to see how it can be maintained that the trial of a crime in a federal court need not be by jury, provided the accused persons consent to be tried in some other manner. The question of how he shall be tried does not seem open to his determination but appears to have been settled for him by the mandatory provision of the Constitution of the United States, however it might be under the Constitution of the state differently worded. It is necessary, too, to have in mind that the trial of one charged with crime affects not merely the rights of the accused but the public interests. As Blackstone expressed it, 4 Commentaries, page 189, 'the king has an interest in the preservation of all his subjects.' The Declaration of Independence declares that all men are endowed by their Creator with certain inalienable rights; that among these are life, *liberty* and the pursuit of happiness. In his great work on Constitutional Limitations, p. 576, Judge Cooley, discussing waiver of rights, said that:

"'Consent in a criminal case cannot bind the defendant "since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the state, whether the individual assented or not."'"

The court then refers to the case of *Crain* v. *U. S.*, 162 U. S. 625, 40 L. ed. 1097, where the Supreme Court of the United States sets aside a judgment of conviction for forgery and a sentence of imprisonment for three years, because the record did not affirmatively show that the accused had been formally arraigned or that he pleaded to the indictment, although it showed that the jury had been duly selected, impaneled and sworn to try the issues joined. The government in that case claimed that it should be assumed that the defendant had pleaded not guilty and failure to record the fact was a clerical error which did not prejudice his substantial rights. Mr. Justice Harlan, writing the opinion of the court, said:

"In *Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, this court, observing that the public has an interest in the life and liberty of an accused person, said:

"'Neither can be lawfully taken except in the mode prescribed by law.'

"'That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.'"

Justice Harlan then added:

"The present defendant may be guilty, and may deserve the full punishment imposed upon

him by the sentence of the court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

The Circuit Court of Appeals then quotes from the case of *Low* v. *U. S.*, 169 Fed. 86, being an opinion by Mr. Justice Lurton while upon the circuit, and which case we have previously considered and cited, and the court refers to the Constitutions of California, Montana and Virginia upon the subject of trial by jury, stating that, of course, while the state constitutions have no application to trial in the federal court for offenses against the United States, they are interesting as showing the deep-seated conviction of the people of the various commonwealths that the life and liberty of the citizens of this country "should be protected by the courts against forfeiture, except in accordance with the established principles of law, which cannot be waived by the voluntary action of the individual."

The court then considers the difference between civil and criminal cases and between the language of the constitutional provisions relating thereto and between the rights of the parties concerned, to waive trial by jury. The court also considers the right to waive a jury trial when a person is accused of a minor offense because the Constitution secures a jury trial only in cases in which it is a matter of right at common law, citing the case of *Shick* v. *United States*, 195 U. S. 65, 49 L. ed. 99.

Judge Thompson in his work on Trials, Section 6, is quoted by the court as stating:

> "While in cases of felony the constitutional right to be tried by a jury of twelve men cannot be waived by the accused, in cases of misdemeanor the rule is different, especially where the punishment is a pecuniary fine merely."

The court then cites the case of *West* v. *State,* 42 Fla. 244, 28 So. 430, where the court said:

> "The common law rule is that in a trial for felony, if a juror, the judge or the prisoner become incapacitated, by illness or death, after the jury is impaneled and sworn in chief, the proper course to pursue is to declare a mistrial and begin *de novo.*"

After citing several state cases including cases from Mississippi, Nevada, West Virginia, Georgia, Iowa and California, to the effect that where a juror is excused owing to sickness, the trial must begin *de novo,* the court then refers to the case of *Caucemi* v. *People,* 18 N. Y. 128, where it appears that a juror was withdrawn from the panel of twelve, in pursuance of a stipulation signed by the accused and filed in open court, the stipulation reciting that the verdict might be rendered by the eleven jurors and that "the twelve names now appearing of record as the jury in this case may remain, so that by the record, this case shall appear to have been tried by twelve jurors." The New York Court held that this invalidated the trial, the consent of the prisoner being a nullity and the conviction illegal. After referring to the holding by the New York Court that the state had an interest in the preservation of the liberties and lives of the citizens, it states:

"As a criminal prosecution may result in a forfeiture of the life or liberty of the accused the consent of the latter 'should not be permitted to extend so far to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws.'"

The court further says:

"The opinion points out that consent may, in many particulars, affect the proceedings; that objections to jurors may be waived; that the court may be substituted for triers to dispose of challenges to jurors; that secondary evidence may be received in place of primary evidence; that admissions of fact may be allowed. 'But, when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change nor has the defendant.'"

The court then points out the difference between the language of the Constitution of the United States and the language of the Constitution of Iowa in explanation of the decision of the Iowa court in the case of *State* v. *Kaufman*, 51 Iowa 578, and then refers to the case of *Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, heretofore considered by us in this brief.

The court then proceeds to consider authorities dealing with the substitution of judges during the trial and reaches the conclusion stated in opening our discussion of this case.

A recent decision from the Circuit Court of Appeals of the Fourth Circuit is found in the case of *Grove* v. *U. S.*, 3 Fed (2nd) 965. That case is not

directly in point upon the proposition here presented, but shows the sympathetic view of the Circuit Court of Appeals of the Fourth Circuit concerning the principles we contend are applicable. In the Grove case a jury was impaneled and sworn to try the defendant and the evidence was partially heard when one juror became ill. The judge there did what we conceive to have been the mandatory duty of the trial judge in this case. That is, he declared a mistrial but by consent of the parties another juror was drawn to fill the box with the remaining eleven jurors and the trial opened again. To expedite the trial, it was agreed between the government and accused that the witnesses which had been used before the other jury might be recalled to the stand and sworn to state that the testimony they had previously given was true and then that the stenographer might, to expedite matters, read the testimony, both direct and cross examination that had been taken before the other jury. Either party was given the right to ask other or additional questions of the witnesses if desired. Upon conviction the defendants complained that the proceeding was irregular and, indeed, one of the circuit judges, Judge Waddill, was of the opinion that the proceeding was irregular but the other two judges were of the opinion that all of the rights of the accused were preserved to him and that while the eleven jurors who had sat in the first trial of the case were disqualified and could not have been forced upon him, that he might waive the disqualification of the jurors, which he expressly agreed to do. This, we conceive to be in accordance with the

principles announced in the Queenan case, but the procedure showed a clear recognition of the fact that before a lawful verdict could be returned in the case there must be twelve jurors concurring in the verdict. Otherwise, it was not the verdict of a *jury* because there was no *jury*, as defined by common law and adopted by our Constitution, to return a verdict unless there were twelve members participating in the verdict. It was, in our opinion, and as stated by the learned courts we have cited, but a mere arbitration—a substantial change in the forum provided by the Constitution for the trial of pleas of not guilty in felony cases, and furnished no basis upon which the trial court could pronounce a lawful judgment and sentence.

The case of *Rassmussen* v. *U. S.*, 197 U. S. 516, 49 L. ed. 862, involved the constitutionality of an Act of Congress which purported to fix for Alaska Territory a jury of six men to try misdemeanor cases. The court in that case referred with approval to its former decision in *Thompson* v. *Utah*, (*supra*) and held the Act of Congress unconstitutional and void in that it was repugnant to the Sixth Amendment to the Constitution. The opinion of the court was rendered by Mr. Justice White and concurring opinions were filed by both Mr. Justice Harlan and Mr. Justice Brown.

The case of *Diaz* v. *United States*, 223 U. S. 442, 56 L. Ed. 500, was a case involving a trial in the Philippine Islands where the defendant had voluntarily absented himself from the court room during the examination of some of the witnesses, but had consented that examination might be made in his absence. Mr.

Justice VanDevanter writes the opinion of the court, holding, in substance, that this particular privilege of the accused might be waived, but distinguishing the case from the case of *Thompson* v. *Utah*, where the tribunal was by consent attempted to be changed from that provided by law for the trial of felonies. Distinguishing between the case cited and referring to the Thompson case, Justice VanDevanter said:

> "And in the other (Thompson) case the question was whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law, to try him; and it was held he could not."

The Circuit Court of Appeals of the Ninth Circuit, in an opinion rendered February 11th, 1929, in the case of *Gibson, et al.* v. *U. S.*, 31 Fed. (2nd) 19, had occasion to voice again the well understood rule announced in the cases we have previously cited. In the Gibson case, which was a conspiracy trial, the hearing was had in the State of Washington and following the state practice, the court had caused to be selected and qualified, at the time the jury was impaneled, a thirteenth or alternate juror. This was done by consent of both the government and the defendant. However, no exigency arose for the purported use of the thirteenth juror and he was excused prior to the submission of the case to the jury by the court. Defendant urged for the first time on appeal error in permitting the thirteenth juror to be selected. The court held that there was

no federal statute authorizing such practice but that the juror had never served nor functioned as a juror in the case and only the original twelve men had acted throughout the case and in the verdict and therefore there was no prejudicial error occurring. The court, however, in its opinion, 31 Fed. (2nd) page 21, had occasion to make this observation:

> "There is no federal statute authorizing such a practice and it is to be conceded that in a federal court the defendant charged with a felony has the right to trial by jury, and, further, that by jury is meant a body of twelve and that such right cannot be waived."

Citing Constitution of United States, Art. 3, Sec. 2.
Maxwell v. *Dow*, 176 U. S. 586.
Thompson v. *Utah*, 170 U. S. 343.
Rasmussen v. *U. S.*, 197 U. S. 516.
Low v. *U. S.*, 169 Fed. 86-91.

We have heretofore considered all of these cited cases.

A rather clearly reasoned case is that of *Territory of Montana* v. *Ah Wah, et al.* Opinion was rendered by Mr. Chief Justice Wade of the territorial court and is reported in 1st Pac. 732.

Upon a trial for murder, one of the jurors was excused on account of sickness in his family and the trial proceeded to a final conclusion before the remaining eleven jurors who found the defendant guilty. The juror was excused with the consent of the defendants and the trial continued to the eleven jurors by agreement. It is true the case was a capital case. There appears to be no distinction drawn or susceptible of being drawn in federal practice between a capital case

and any other felony. In the opinion the Montana jurist uses the following pertinent language:

> "The law has established certain tribunals, with defined powers and forms of proceedings, for the trial of persons charged with crime. Security to the defendant and to the public is only found in a strict compliance with the law of the land. Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the prosecution nor the defendant, by any act of their own, can change or modify the law by which criminal trials are controlled. If, with the consent of the court and the prosecution, the defendant may have a trial with one juryman less than a constitutional jury, why, with like consent, might he not have a trial with one juryman more than a constitutional jury? If by his own act the defendant might take one from a lawful jury, we do not see why he might not add one thereto. In either case there would be a failure of jurisdiction, because jurisdiction attaches to and makes valid a verdict when rendered by a jury, and a jury is 12 men. * * * By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration."

The court then cites the case of *Caucemi* v. *People*, 18 N. Y. 136 to which we have heretofore called attention. The Montana court further cites the case of *State* v. *Mansfreed*, 41 Mo. 470, where the opinion is by Justice Wagner who cites Chitty as follows:

> "'The petit jury,' says Chitty, 'must consist of precisely twelve, and is never to be more or less, and this fact it is necessary to insert upon the record. If, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed on error.' 1 Chit. Crim. Law, 505."

Judge Wagner made the further pertinent observation:

> "Another good and sufficient reason, it occurs to us, is that the prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. He can, unquestionably, waive many of his legal rights and privileges. He may agree to certain facts, and dispense with formal proofs; he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors; but he has no power to consent to the creation of a new tribunal, unknown to the law, to try his offense. The law, in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and different tribunal to pass upon his guilt or innocence. The law as to criminal trials should be based upon fixed standards and should be clear, definite and absolute."

The Montana court further cites the case of *Hill* v. *People,* 16 Mich. 357, where the Michigan court holds to the same view and cites various earlier cases to the effect that the government and the defendant cannot, by agreement, create a tribunal unknown to the law to try a plea of not guilty in a felony case. The Michigan court is quoted as using this pertinent language:

> "Let it once be settled that a defendant may thus waive his constitutional rights, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or

neglect might be recognized as a waiver in one case and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of the courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

Conclusion.

In conclusion let us respectfully submit to the court that although there was evidently an attempt made in good faith by the United States Attorney and the defendants and their counsel to avoid the retrial of this case, made necessary by the unfortunate illness of a member of the jury, it is so apparent that the parties could not, by agreement, change the tribunal provided by the Constitution for the trial of the defendants' plea of not guilty, that we respectfully submit that the settled rule of law in this court and in the Federal Courts, supported by the weight of authority and reasoning of the various state courts, requires that this court answer the certified question in the negative and advise the circuit court of appeals that the purported verdict of eleven jurors was a nullity and was insufficient to support a judgment of conviction by the trial court.

Very respectfully submitted,

CLAUDE NOWLIN,
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No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1929

JOHN PATTON, HAROLD CONANT, AND JACK BAKER

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

There is no report of any opinion of the District Court in this case. The certificate of the Circuit Court of Appeals is reported in 30 F. (2d) 1015.

JURISDICTION

The case is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION CERTIFIED

The question certified (R. 6) is as follows:

> Question. After the commencement of a trial in a Federal court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary

sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government through its official representative in charge of the case consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?

PROVISIONS OF CONSTITUTION AND OF STATUTES

Article III, Section 2, Clause 3, of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Revised Statutes, Section 566, provides:

> The trial of issues of fact in the district court, in all causes except cases in equity and

cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it. (See U. S. C., Title 28, Sec. 770.)

Revised Statutes, Section 648, provides:

> The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section. [The next section relates to civil cases.]

STATEMENT

The defendants were indicted for conspiring to bribe a Federal prohibition officer to violate his duty to enforce the National Prohibition Act and for the payment of bribes to that officer. (R. 1.)

The trial had proceeded for a week when one of the twelve jurors became so ill that he was unable to serve further as a juror, and it was stipulated in open court by the Government and by counsel for the defendants, with the personal assent of the defendants, that the trial should proceed with eleven jurors.

(R. 2–4.) The trial was concluded on the following day. At the time of the stipulation to proceed with eleven jurors, the Government had introduced its evidence in chief and the defendants had introduced most of their evidence. Rebuttal evidence on the part of the Government was introduced after the making of the stipulation. (R. 2.) Several of the defendants were acquitted, but these defendants were convicted and sentenced to terms in the penitentiary. (R. 2.)

The defendants assigned as error that twelve jurors were necessary throughout the entire trial and that the accused had no power to waive such a jury. (R. 4, 5.) The Circuit Court of Appeals, setting forth the above facts, said (R. 5–6):

> In view of the fact that the case was commenced with a proper constitutional jury of twelve men and so proceeded for nearly seven days and that upon the juror becoming ill defendants through their counsel evidenced their desire to proceed with the trial, and personally assented that the trial should proceed to a finality before the remaining eleven jurors as if twelve jurors were in the box, and in view of the general holdings of the courts that such constitutional rights for the protection of a defendant as a speedy trial, to be confronted with the witnesses against him and to have the assistance of counsel can be waived, we are in doubt as to the law applicable to the situation here presented, and so desire the instruction of the Supreme Court upon [the certified question set forth above.]

SUMMARY OF ARGUMENT

I. The Federal Constitution gives a defendant charged with such an offense as is here involved an inviolable right to trial by a jury of twelve, but does not forbid the express waiver of this right. There is language in the opinion in *Thompson* v. *Utah*, 170 U. S. 343, to the effect that the right could not be waived. But the question has never been decided by this Court, and views substantially opposed to those expressed in *Thompson* v. *Utah* were stated in *Schick* v. *United States*, 195 U. S. 65.

The decisions of State courts are substantially uniform in upholding the validity of statutes providing for the waiver of jury trial. The variations in phraseology between the provisions of the Federal Constitution and those of typical State constitutions are not of significance.

The language of Article III, Section 2, of the Federal Constitution should be interpreted in the light of the Sixth Amendment and as creating a right to trial by jury rather than as a mandatory requirement to be imposed against the will of the defendant. Other rights conferred by the Fifth, Sixth, and Seventh Amendments have generally been held to be waivable. There is no reason why the right to trial by jury should be regarded as standing upon any different footing. The argument that this right can not be waived because of a public interest in the life and liberty of the accused is answered by the fact that a defendant may place his life or liberty in greater jeopardy by pleading guilty.

The historical background of the provisions of the Federal Constitution tends to support the view that their purpose was to create a right and not a mandatory requirement. The evil which was to be met by the constitutional guaranty was the denial of trial by jury.

Waiver of trial by jury, even in cases of serious offenses, was not unknown at the time of the adoption of the Constitution. In Massachusetts, Vermont, Connecticut, Maryland, and Pennsylvania there is evidence of a practice in the period prior to, or substantially contemporaneous with, the adoption of the Constitution to allow the defendant to waive trial by jury and to be tried by the court if he so desired.

II. The provisions of statutes prescribing trial by jury or the absence of statutory authorization for a waiver thereof has been held in many State decisions to prevent such waiver. The decisions of this Court seem not to accept this view, but rather tend to uphold the validity of such a waiver in both criminal and civil cases under the general statutes prescribing trial by jury in the lower Federal courts. But whether or not the present Federal statutes may be regarded as permitting the waiver of the entire jury in advance of trial in felony cases, it is our view that the case at bar does not necessitate a decision on the question of the waiver of the entire jury.

III. On the facts of the present case, there was no substantial departure from the mode of trial by jury. Even if the waiver of the entire jury in advance of trial were held to be unauthorized either by the

Constitution or by the statutes, the defendants' right to waive an irregularity of the sort here involved should be recognized. A decision that the defendants were without power to meet the exigency which arose in this case by consenting to the trial proceeding before the remaining eleven jurors and to be bound by their verdict would involve hardships which are not necessitated either by the Constitution or by the statutes.

ARGUMENT

I

The Federal Constitution Gives a Defendant Charged With Such an Offense as is Here Involved an Inviolable Right to Trial by a Jury of Twelve, But Does Not Preclude His Express Waiver Thereof

It is conceded that the defendants, being charged with felonies of a serious nature, were entitled to trial before a jury of twelve. *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343; *Maxwell* v. *Dow*, 176 U. S. 581; *Rassmussen* v. *United States*, 197 U. S. 516, 519.

The trial here involved commenced and continued to near its completion before a jury so constituted. But the verdict was that of eleven men only. The question whether, on all the facts, this case presents any substantial departure from the mode of trial by jury will be discussed under Point III (pp. 53–68, *infra*). It is defendants' contention that the waiver here involved was of an essential element of jury trial, and is not good unless waiver of the entire jury in advance of trial would be good. The question of the

waiver of the entire jury will therefore be first considered. The objection to such a waiver may rest on either statutory or constitutional grounds. The statutory question is discussed in Point II (pp. 47–53, *infra*).

The two provisions of the Federal Constitution relating to trial by jury are differently phrased. The language of Article III, Section 2, is that—

> The Trial of all Crimes * * * shall be by Jury; * * *.

The Sixth Amendment is phrased:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

The question is whether these provisions are to be construed as mandatorily imposing the institution of trial by jury in all criminal cases within their purview, so that even a statute authorizing a waiver of such a trial would be invalid, or as intended simply to guarantee a right to jury trial, inviolable in the sense that it could not be impaired, by statute or otherwise, against the will of the accused, but waivable by him if he so desires.

(a) DECISIONS OF THIS COURT AND OF OTHER COURTS TEND TO SUPPORT THE CONCLUSION THAT THE CONSTITUTION DOES NOT PRECLUDE WAIVER OF A JURY TRIAL

The notion which has prevailed in certain decisions of the lower Federal courts, cited in defendants' brief, that the Constitution precludes a waiver of trial by

jury is based largely upon the following language of this Court in *Thompson* v. *Utah*, 170 U. S. 343, 353:

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt.

But *Thompson* v. *Utah* did not decide that there was any constitutional objection to the waiver by a defendant of trial by jury. In the first place, no question of express waiver was involved. The defendant in that case was charged with a felony. His first trial, which took place in the District Court of the Territory of Utah before a jury of twelve men in accordance with the applicable statutes, resulted in conviction. A new trial was granted, but did not take place until after Utah had become a State. The constitution of the State then provided that in courts of general jurisdiction, except in capital cases, a jury should consist of eight persons. At his second trial, the defendant was convicted by a jury of eight. Such a jury was imposed upon him by the constitution of the State, and his only consent to such procedure was that which might be inferred from his failure to object thereto until after the verdict. This Court held that the provision of the Utah constitution prescribing a jury of eight was, with respect to a crime

committed before statehood, an *ex post facto* law, and the judgment of conviction was reversed. In the second place, this Court's opinion, in so far as it relates to the defendant's implied consent to trial by a jury of eight, was based at least in part, and might have been based wholly, not upon any idea of constitutional objection to such consent, but rather upon a construction of the statutes in force in the Territory of Utah at the time the offense was committed. The Court refers (p. 345) to statutes of the Territory "that a trial jury in a District Court should consist of twelve * * * persons, unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number" and "that issues of fact should be tried by jury, unless a trial in that mode was waived in criminal cases not amounting to a felony by the consent of both parties expressed in open court and entered in its minutes." This statute, by clear implication, precluded even an express waiver in felony cases. The opinion in *Thompson* v. *Utah*, immediately following the passage first quoted, proceeds (pp. 353–354):

> The *law* in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of *Hopt* v. *Utah*, above cited, the question arose whether the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to their trial of the several

> challenges in his absence. The court said: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the *statutory requirement* as to his personal presence at the trial. * * *" (Italics ours.)

See, also, this Court's explanation of *Thompson* v. *Utah* in *Diaz* v. *United States*, 223 U. S. 442, 459:

> And in the other the question was, whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law, to try him; and it was held that he could not.

If the language first quoted from this Court's opinion in *Thompson* v. *Utah* is to be construed as indicating that waiver of trial by jury is impossible on constitutional grounds, that language was not necessary to the decision and should not be held to preclude re-examination of that question.

In *Schick* v. *United States*, 195 U. S. 65, this Court upheld an express waiver of jury trial in the case of a petty offense which was not a "crime" within the language of the Third Article of the Constitution, saying (pp. 71–72):

> But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be

> that a defendant can plead guilty of the most serious, even a capital, offense, and thus dispense with all inquiry by a jury, and cannot when informed against for a petty offense waive a trial by jury? Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right "to be confronted with the witnesses against him * * * and to have the assistance of counsel." Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

As evidence that no public policy forbade the waiving of a jury in the trial of petty offenses, this Court referred in the *Schick case* (p. 71) to Section 44 of the Code of Law for the District of Columbia, which covered more than petty offenses, and expressly provided in part that—

> In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge * * *.

The applicability of the above-quoted statute and the validity of a waiver of a jury trial thereunder in a prosecution for larceny, a felony, the penalty for which was imprisonment from one to three years, was recognized in *Belt* v. *United States*, 4 App. D. C. 25. Belt had been sentenced for a second offense, having previously been convicted by a judge sitting without a jury by the defendant's consent pursuant to the statute. The court upheld the validity of the statute, saying (pp. 35–36):

> We can not regard the verbal differences between the Third Article of the Constitution and the Sixth and Seventh Amendments as being of much significance. Plainly all these constitutional provisions were intended to subserve a great public policy, in the perpetuation of a system of trial which was assumed to have been greatly involved in the development of our civil liberty. They were not intended to force that system upon us on all occasions, whether we willed it or not. Trial by jury, after all, is no more than an incident in our judicial system. It is but one of the modes known to the law for the determination of some of the issues that arise in our judicial controversies. It is only one of the instrumentalities of the courts; and like all other instrumentalities dependent upon its efficacy for its perpetuation. If the litigants before a tribunal find it to their interest to dispense with it upon any special occasion, and they distinctly agree to dispense with it for that occasion, and determine the fact in controversy in some other manner, as by the

> court itself which is to pronounce the final judgment, there is no reason why they should not be permitted so to do. When the state and the individual, in their controversy over the question of criminal liability on the part of the latter, agree to refer that issue to the court, instead of the jury, and the agreement is the result of the free will of the accused, and the accused has entered into the agreement because he regards it to his advantage so to do, as we must assume it is, it is difficult in reason to see where there is any violation of constitutional right.

The *Belt case* came to this Court (*In re Belt*, 159 U. S. 95) on an application for leave to file a petition for habeas corpus. This Court held that as the trial court when trying the second offense had jurisdiction and authority to pass upon the validity of the statute, habeas corpus would not lie, but it also referred (p. 99) to several decisions which sustained State statutes authorizing the waiver of trial by jury.

See also *Territory* v. *Soga*, 20 Hawaii, 71, 91, 95, where the validity of a statute authorizing waiver of trial by jury was recognized and the withdrawal of one juror during a trial for a misdemeanor with the consent of the defendants and the prosecution was held permissible.

On the other hand, the Circuit Court of Appeals for the Sixth Circuit, in *Low* v. *United States*, 109 Fed. 86, in holding that in the case of a crime of a serious nature it was not competent for the parties to waive a jury and try the plea of not guilty to the court, said (p. 91):

> The suggestion that the effect of the sixth amendment is to modify the force and effect of the jury clause in the third article by converting a constitutional requirement into a privilege which an accused may exercise or not, as he may elect, is not tenable.

Other decisions of the lower Federal courts are likewise conflicting. The waiver of a jury was held invalid in *Coates* v. *United States*, 290 Fed. 134 (C. C. A. 4th), with a citation of *Thompson* v. *Utah*. In *United States* v. *Praeger*, 149 Fed. 474, it was held that the defendant might waive a jury in a misdemeanor case; and in *United States* v. *Shaw*, 59 Fed. 110, likewise involving a misdemeanor, the waiver was held invalid only because the defendant did not expressly consent. In the territorial courts, the waiver of a jury in a misdemeanor case was upheld in *Ex parte Dunlap*, 5 Alaska, 521; but in the similar case of *In re Virch*, 5 Alaska, 500, and in *In re McQuown*, 19 Okla. 347, such a waiver was held invalid. In decisions involving the validity of trials before a jury of eleven with the defendant's consent, conclusions negativing the validity of the waiver of jury trial have been expressed by the majority of the court in *Dickinson* v. *United States*, 159 Fed. 801 (C. C. A. 1st), and in two decisions by territorial courts. *Territory* v. *Ah Wah*, 4 Mont. 149; *Territory* v. *Ortiz*, 8 N. M. 154.

There is substantial uniformity in the decisions of the State courts in which the question of the constitutionality of statutes providing for the waiver of the entire jury has been presented. The validity of such statutes has been expressly adjudicated in a

great number of States, and in every instance the constitutionality of such a statute has been upheld.[1]

Alabama: *Connelly* v. *State*, 60 Ala. 89; *Ireland* v. *State*, 11 Ala. App. 155; *Baader* v. *State*, 201 Ala. 76.

Arizona: *State* v. *Shearer*, 27 Ariz. 311.

Connecticut: *State* v. *Worden*, 46 Conn. 349; *State* v. *Rankin*, 102 Conn. 46.

Georgia: *Logan* v. *State*, 86 Ga. 266; *Moore* v. *State*, 124 Ga. 30.

Illinois: *Brewster* v. *People*, 183 Ill. 143; *People* v. *Fisher*, 303 Ill. 430.

Indiana: *Murphy* v. *State*, 97 Ind. 579.

Kansas: *In re Clancy*, 112 Kan. 247.

Maryland: *League* v. *State*, 36 Md. 257.

Massachusetts: See *Commonwealth* v. *Rowe*, 257 Mass. 172.

Michigan: *Ward* v. *People*, 30 Mich. 116; *People* v. *Steele*, 94 Mich. 437; *People* v. *Jones*, 220 Mich. 633; *People* v. *Henderson*, 246 Mich. 481.

Minnesota: *State* v. *Woodling*, 53 Minn. 142; *State* v. *Graves*, 161 Minn. 422.

Missouri: *State* v. *Moody*, 24 Mo. 560; *State* v. *Bockstruck*, 136 Mo. 335.

New Jersey: *Edwards* v. *State*, 45 N. J. L. 419.

Ohio: *Miller* v. *State*, 3 Ohio St. 475; *Dailey* v. *State*, 4 Ohio St. 57; *Dillingham* v. *State*, 5 Ohio St. 280; *Billigheimer* v. *State*, 32 Ohio St. 435; *Hoffman* v. *State*, 98 Ohio St. 137.

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[1] There are statements in the decisions in New York and North Carolina which indicate that in those States a statute providing for waiver would not be sustained. *People* v. *Cosmo*, 205 N. Y. 91, 96; *State* v. *Stewart*, 89 N. C. 563, 564; *State* v. *Rogers*, 162 N. C. 656, 660. But *cf. State* v. *Holt*, 90 N. C. 749, 754.

Texas: *Lee* v. *State*, 86 Tex. Cr. 203; *Armstrong* v. *State*, 98 Tex. Cr. 335.

West Virginia: *State* v. *Griggs*, 34 W. Va. 78; *State* v. *Denoon*, 34 W. Va. 139.

Wisconsin: *In re Staff*, 63 Wis. 285.

In *State* v. *Woodling*, 53 Minn. 142, *supra*, the court said (p. 145):

> This language imports merely a grant or guaranty of a right to the accused for his own protection, and seems to us never to have been intended to prescribe the organization of the court, or to make a jury an essential part of it. If this be so, it necessarily follows that the presence or absence of a jury is not a jurisdictional matter,—that is, it does not go to the constitutional organization of the court,—and that, if the defendant can not waive a jury trial, it must be purely upon grounds of public policy, and because the public have such an interest in the life and liberty of the citizen that he ought not to be allowed to waive this safeguard which the constitution has thrown around him. If the right is intended merely for his protection, it is difficult to see why on principle he may not waive it, or why any distinction in that regard should be made between the right to a jury trial and various other rights which it is uniformly held that he can waive. It is also difficult to perceive the distinction sometimes made in this respect between misdemeanors and felonies, unless it be founded on considerations of public policy growing out of the greater severity of punishment in case of the latter.

In *Dailey* v. *State*, 4 Ohio St. 57, *supra*, the court said (p. 59):

> Does this act in any sense interfere with the right of trial by a jury? If the act had provided, in express terms, that the accused might have his own choice of two modes of trial, either by the court or jury, as he might think proper, and if he supposed the court the safer mode of trial, should expressly waive his right of trial by jury, and request that the court should try the issue, it would be hard to see how his right of trial by a jury was violated. The provision of the constitution was intended to limit the power of the legislature in this particular, and prohibit it from depriving the accused of the right to have a jury of twelve impartial men to pass on his guilt or innocence. That right still exists; all he has to do is to demand a jury trial, and the law awards it to him; but if he will not demand such trial, then the law authorizes the judge to try the issue.

In *Edwards* v. *State*, 45 N. J. L. 419, *supra*, it was said (p. 427):

> Both provisions [as to presentment and as to trial by jury] are provisions made for the benefit of the accused, and both are subject to that fundamental rule of law that a person may renounce a provision made for his benefit, and to that maxim *quilibet potest renunciare juri pro se introducto*, which applies as well to constitutional law as to any other.

It is true that in all of the above States, except Massachusetts, New York, North Carolina, and West

Virginia, the constitutional provisions in terms created only a right to trial by jury.[3] They contain, with certain variations, the two following clauses:

> The right to trial by jury shall be inviolate. In all criminal prosecutions, the accused

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[3] In some States there are express provisions in the constitutions authorizing the waiver of jury trial in criminal cases. In at least three of the States these constitutional provisions for waiver apply in all cases without regard to the gravity of the offense involved. California Const., Art. I, Sec. 7, as amended in 1927; Oklahoma Const., Art. VII, Sec. 20; Virginia Const., Art. I, Sec. 8, as amended in 1928. In the other States having constitutional provisions on the question of waiver of jury trial in criminal cases, the waiver is authorized only in cases not amounting to a felony. Idaho Const., Art. I, Sec. 7; Montana Const., Art. III, Sec. 23; Vermont Const., c. I, Arts. 10, 12, as amended in 1924. In Maryland (Const., Art. IV, Sec. 8), Minnesota (Const., Art. I, Sec. 4), North Carolina (Const., Art. IV, Sec. 13), and Wisconsin (Const., Art. I, Sec. 5) the constitutions contain general language relating to waiver, but these provisions have been applied to civil cases only.

Some of the State statutes allowing waiver of jury apply to all cases without regard to the gravity of the offense. See, *e. g.*, Connecticut Pub. Acts 1921, c. 267; Indiana Stat. (Burns, 1926), Sec. 2299; Maryland Code (1924), Art. 27, Sec. 549; Michigan Pub. Acts 1927, No. 175, c. III, Sec. 3; Ohio Laws 1929, p. 123, Sec. 13442–4; Rhode Island Laws 1929, c. 1335; Wisconsin Stats. 1927, Sec. 357.01.

In other States the statutes limit the provision for waiver to cases other than capital cases and trials for murder or treason. Massachusetts Acts 1929, c. 185; New Jersey Comp. Stat. (1910), Criminal Procedure, Secs. 13, 13a; Washington Comp. Stat. (1922), Sec. 2144.

In another group of States the waiver authorized by statute applies only in the trial of misdemeanors, or crimes "not amounting to a felony." See, *e. g.*, Arizona Rev. Stat. (1928), Sec. 553; Arkansas Stat. (1921), Secs. 3085–86; Delaware Laws, 1927, c. 233; Florida Comp. Gen. Laws (1927), Sec.

> shall be allowed a speedy and public trial, by an impartial jury of the county in which the offense is alleged to have been committed.

The latter provision corresponds closely to the Sixth Amendment of the Federal Constitution. Some of the cases above cited have expressly referred to the difference in language between the State constitutional provisions there involved and that contained in the Third Article of the Federal Constitution. *State* v. *Worden*, 46 Conn. 349, 366; *State* v. *Woodling*, 53 Minn. 142, 144; *In re Staff*, 63 Wis. 285, 292. See also *Commonwealth* v. *Hall*, 291 Pa. 341, 346–347.

But the Massachusetts and West Virginia cases above cited were decided under constitutional provisions which are quite comparable to Article III of the Federal Constitution. The Massachusetts Constitution, Part I, Art. XII, provides:

> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

In *Commonwealth* v. *Rowe*, 257 Mass. 172, the defendants were indicted for larceny. At the trial

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8380; Illinois Rev. Stat. (Cahill, 1929), c. 37, Sec. 318; Kansas Rev. Stat. (1923), c. 62, Sec. 1401; Missouri Rev. Stat. (1919), Secs. 4005–06; Nevada Rev. Laws (1912), Sec. 7122; Texas Code of Criminal Procedure, Art. 11; Utah Comp. Laws (1917), Sec. 8925; West Virginia Code (1923), c. 116, Sec. 29; Wyoming Comp. Stat. Ann. (1920), Sec. 7389.

This list of statutes is not exhaustive but includes the more important examples. Some of the statutes here cited have not been passed upon by the courts. And some of the decisions above cited involved statutes earlier than those here referred to.

they pleaded not guilty, and then demanded as a constitutional right that they be tried by the judge sitting without a jury. The trial was accordingly held without a jury, and the defendants were found guilty. They carried the case to the Supreme Judicial Court, contending that the waiver of trial by jury was invalid. The court considered the question at length and stated as its clear opinion that there was no constitutional objection to waiver of trial by jury in criminal cases, saying (pp. 174–175):

> We have no doubt that the right to trial by jury guaranteed by our Constitution to every person, Declaration of Rights, arts. 12, 15, is a privilege which the person may waive for reasons satisfactory to himself. * * *
>
> * * * * * *
>
> We find nothing in the words of our Constitution which declares or manifests an intention to deprive the individual of power to refuse to assert his constitutional right to trial by jury.

The final decision of the case was that the conviction was invalid because there was no statute expressly authorizing the court to try criminal cases without a jury, and that because of the lack of statutory authority the powers of the Superior Court were limited. But, the court concluded (pp. 180–181):

> The Legislature, which imposed the limitation, can remove it. In so doing, it will be acting within its constitutional powers, as the right of the accused to a jury trial on disputed facts will not be lessened.

Accepting this clear expression of opinion by the Supreme Judicial Court the legislature in 1929 enacted a statute authorizing waiver in all criminal cases not capital. Mass. Acts 1929, c. 185.

The Constitution of West Virginia, Article III, Sec. 14, provides:

> Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men * * *.

In 1873 the West Virginia Legislature enacted a statute providing that "In any case, except a case of felony," the parties might waive a jury and submit the case to the court. W. Va. Acts 1872–1873, c. 47, Sec. 35; now in W. Va. Code (Barnes, 1923), c. 116, Sec. 29. The constitutionality of this statute was soon contested. In *State* v. *Cottrill*, 31 W. Va. 162, the court was equally divided on the question. But a short time later, in *State* v. *Griggs*, 34 W. Va. 78, and *State* v. *Denoon*, 34 W. Va. 139, the court was unanimous in holding the statute constitutional.

We submit that the variation in language between the constitutional provisions above discussed does not necessitate a conclusion that there was any difference in purpose. All of these provisions were intended to create an inviolable right to trial by jury. Under none of them would the imposition of trial without jury against the will of the defendant be valid in the case of infamous offenses. But in many types of cases a defendant may himself much prefer

trial to the court than trial by jury. And it is our view that it would require stronger language than that contained in either clause of the Federal Constitution to necessitate the conclusion that, as a matter of constitutional law, as distinguished from statutory law, the intention was to impose trial by jury upon him in all cases even though against his will. Certainly, no decision of this Court requires such a conclusion.

The language in *Callan* v. *Wilson, supra* (127 U. S., p. 549)—

> And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them.

must be read in the light of the discussion of which it was a part. The question which the Court was considering was whether the constitutional provisions applied to the District of Columbia. It was held that the Third Article and the Sixth Amendment, read together, showed an intention to confer the right of trial by jury upon all the people of the United States. In later considering the contention that the constitutional guaranty of trial by jury had not been denied, this Court (pp. 550–551) refers to "the slight difference in phraseology between the third article and the Sixth Amendment—the former declaring that the trial of all crimes 'shall be' by

jury, and the latter that the accused shall 'enjoy the right' to trial in that mode."[3]

The words "shall be by jury" have received a construction by this Court which is entirely pertinent here. In civil cases, the only constitutional provi-

[3] The pertinent amendments, as proposed by Madison, read as follows (Annals of Congress, I, 435):

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

* * * * *

"The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may be by law authorized in some other county of the same State, as near as may be to the seat of the offence." (It appears (*ibid.*) that this latter paragraph was intended as a substitute for Section 2 of Article III.)

The Sixth Amendment as finally adopted combined certain of the ideas embodied in each of the above proposals. The phrase regarding the jury was couched in the language of the first proposal, that is, "the accused shall enjoy the right," rather than that of the second, "the trial of all crimes * * * shall be by an impartial jury of freeholders of the vicinage."

The proceedings as reported in the Annals of Congress and the House and Senate Journals of the First Congress do not show whether this difference of phraseology was regarded as significant.

sion is that of the Seventh Amendment providing that "the right of trial by jury shall be preserved," but it is provided by a statute which is applicable both to civil and criminal cases that "the trial of issues of fact * * * *shall be by jury.*" Act of September 24, 1789, c. 20, Secs. 9, 12, 1 Stat. 73, 77, 80; R. S. Secs. 566, 648 (U. S. C., Title 28, Sec. 770). Thus, trial by jury is prescribed by statute in civil cases in identically the same terms as those in which it is prescribed for criminal cases by the Third Article of the Constitution. But this Court has uniformly held that this statute does not prevent the waiver of the jury in civil cases if the parties so desire. This was decided before the Act of March 3, 1865, c. 86, Sec. 4, 13 Stat. 500, 501, relating to *written* waiver in civil cases. *Guild* v. *Frontin*, 18 How. 135; *Campbell* v. *Boyreau*, 21 How. 223. And it has been held since the Act of 1865 that the waiver is valid although it is not in writing. *Kearney* v. *Case*, 12 Wall. 275; *Bond* v. *Dustin*, 112 U. S. 604, 606; *Perego* v. *Dodge*, 163 U. S. 160; *Commissioners of Road District* v. *St. Louis S. W. Ry. Co.*, 257 U. S. 547, 562; *Law* v. *United States*, 266 U. S. 494, 496; *Duignan* v. *United States*, 274 U. S. 195, 198.

In *Schick* v. *United States*, *supra*, this Court said (195 U. S., pp. 68–69):

> If there be any conflict between these two provisions the one found in the amendments must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one.

From the context it appears improbable that in the passage just quoted this Court had in mind the differ-

ence in phraseology between the words "shall be by jury" in the Third Article and the provision that the defendant "shall enjoy the right" to trial by jury in the Sixth Amendment. But whether or not the opinion of this Court in the *Schick case* is to be interpreted as meaning that the principle that "the last expression of the will of the lawmaker prevails over an earlier one" applies to all points of difference between Article III and the Sixth Amendment, manifestly the latter is to be read with the former and is a valuable aid in determining its purpose.

The Sixth Amendment was substantially contemporaneous with the original Constitution and *in pari materia* with the jury provision in the Third Article. That the amendment was phrased in terms of right is strong indication that the original clause had no different purpose. If so, there is no reason why the right to trial by jury should be regarded as standing upon any different footing than other rights conferred by the Fifth, Sixth, and Seventh Amendments, which have been held to be waivable.

The privilege against being twice placed in jeopardy for the same offense, which is given by the Fifth Amendment, may be waived by the defendant. *Trono* v. *United States*, 199 U. S. 521. The defendant in a criminal case may take the witness stand and, if he does so, may be cross-examined as to his testimony. *Fitzpatrick* v. *United States*, 178 U. S. 304, 315; *Powers* v. *United States*, 223 U. S. 303, 314. The defendant may unquestionably waive the right to a speedy trial. *Worthington* v. *United States*, 1 F. (2d) 154,

certiorari denied, 266 U. S. 626; *Phillips* v. *United States*, 201 Fed. 259, 262. He may waive the assistance of counsel for his defense (see note in Ann. Cas. 1913C, 739). And, at least, if the case is not capital and the accused not in custody, he may waive being confronted by the witnesses for the Government. *Diaz* v. *United States*, 223 U. S. 442.

If it be assumed that the constitutional provisions for trial by jury should be construed as guaranteeing a right, there is no valid reason why their benefit should not be waivable. The argument usually advanced to support the view that this constitutional right may not be waived is that the matter concerns the public as well as the individual, and that "no one has a right, by his own voluntary act, to surrender his liberty or part with his life." *Cancemi* v. *People*, 18 N. Y. 128, 137. But unless the intention of the Constitution was to require trial by jury in such sense that its absence goes to the jurisdiction of the court, the argument fails. A man may effectively "by his own voluntary act surrender his liberty or part with his life" by pleading guilty. No public policy forbids this, and a defendant's right so to do is nowhere forbidden by the Constitution. If the public interest in the security of the accused does not preclude his relinquishment of the right to have any inquiry made of the fact of his guilt, surely it should not be deemed to *require* that that inquiry must be by jury rather than by the court.

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(b) THE HISTORICAL BACKGROUND OF THE CONSTITUTIONAL PROVISIONS TENDS TO SUPPORT THE VIEW THAT THEIR PURPOSE WAS TO CREATE A RIGHT AND NOT A MANDATORY REQUIREMENT

All of the guaranties of jury trial, as embodied in both the Federal and the State constitutions, were intended for the benefit of the accused. Eulogies of the excellence of the jury system are therefore of no aid in the solution of the question here involved. They are at least as consistent with an intention to create an inviolable *right* to jury trial as they are with an intention to impose a mandatory *requirement* thereof.

The historical background of these constitutional provisions affords little affirmative evidence of the intention of their framers. It is our view that such evidence as there is supports the conclusion that the purpose was to create a right and not a mandatory requirement. There is at least an entire absence of any evidence that the idea of trial by jury was regarded in any other light than as a protection of the accused against the State. Some of the State constitutions which were in force when the Constitution was adopted established the right of trial by jury (Maryland, Article 19; New Jersey, Article 22; Pennsylvania, Declaration of Rights, Article 9; Virginia, Declaration of Rights, Article 8); while Georgia (Article 61) declared "trial by jury to remain inviolate forever;" North Carolina established trial by jury (Declaration of Rights, Article 9); and Massachusetts (Declaration of Rights, Article 12), New

Hampshire (Bill of Rights, Article 15), and South Carolina (Article 41) provided that no one should be deprived of his life, liberty or estate but by the judgment of his peers or the law of the land. Massachusetts added that the legislature should not make any law that should subject any person to a capital or infamous punishment, excepting for the government of the army and the navy, without trial by jury. Some of the amendments proposed by the State ratifying conventions called for the right of trial by jury (Article 8 of the Declaration of Rights proposed by Virginia, North Carolina and Rhode Island, Debates in the Federal Convention, edited by Hunt and Scott, 661, 675, 682), while New York proposed trial by jury. (*Ibid.* 667.) We submit that the difference in phraseology embodied in these constitutions and proposals does not indicate any difference in their fundamental purpose.

The history of the period immediately preceding the Revolution and the drafting of the Constitution shows that the evil which was to be met by the constitutional guaranty was the denial of the *right* to trial by jury.

Perhaps the chief of the Colonists' grievances so far as trial by jury was concerned was the establishment by Parliament of offenses under the revenue and navigation laws which could be tried in the courts of admiralty and thus without juries. By 1764 the situation created by the trial of crimes in courts of admiralty had apparently become serious. In that year the New York Assembly sent its petition to the

King, Lords, and Commons objecting to the denial of trial by jury in the admiralty courts under the navigation laws. (1 Messages from the Governors of New York, 687, 704, 769, 772.)

In 1765 Parliament aggravated the matter by enacting the Stamp Act, and providing that offenses under it might be prosecuted in the courts of admiralty and, consequently, without juries. (Stat. 5 Geo. III, c. 12.) John Adams, writing early in 1766, expressed the apprehension of the Colonists over the effect of this Act on their liberties (3 Adams, Works, 471):

> What are the powers of the new courts of admiralty in America? Are the trials in these courts *per pares* or *per legem terrae?* Is there any grand jury there to find presentments or indictments? Is there any petit jury to try the facts, guilty or not?

This Act was repealed later in the same year (Stat. 6 Geo. III, c. 11), but in 1767 another Act was passed providing that offenses against the revenue laws might be tried "in any court of vice-admiralty appointed, or to be appointed" (Stat. 8 Geo. III, c. 22). In 1774, the Declaration of Rights adopted by the Continental Congress, referring specifically to the statute last cited and others, resolved that these Acts "extend the powers of the admiralty courts beyond their ancient limits, [and] deprive the American subject of trial by jury." 1 Journals of the Continental Congress 71. Two years later the Declaration of Independence specified as one of the grounds of the

Colonists' grievances against the King that he had assented to laws "For depriving us in many cases, of the benefits of Trial by Jury."

But throughout this period there is no evidence at all that trial by jury was regarded as an institution which must be imposed on a defendant in the public interest whether he wanted it or not. Instead, trial by jury is spoken of as a right. Thus John Adams, in his Diary, for Saturday night, December 23, 1769 (2 Adams, Works, 225, 226), speaks of "the right of juries," and "the benefit of juries." In the Ordinance of 1787, for the government of the Northwest Territory, we find it provided that "The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury."

The records of the Constitutional Convention of 1787 contain no direct evidence as to the point of view of the framers on the question of trial by jury in criminal cases. The clause which later became Article III, Section 2, is mentioned but once in the proceedings of the Convention, except on references to or from committees, and this mention was only to add an amendment to provide for the trial of crimes not committed within any State. (2 Farrand, Records of the Convention, 434, 438.) But in the speeches and writings of delegates to the Convention there are several references to trial by jury in criminal cases, which tend to show that the purpose of the provision in the original Constitution was to protect the citizen from oppression.

James Wilson, addressing a meeting of the citizens of Philadelphia on October 6, 1787, 3 Farrand 101.

James Wilson, in the Pennsylvania Convention, December 7, 1787, 2 Elliot's Debates (1854) 487; 3 Farrand 163.

Luther Martin, in his "Genuine Information," 3 Farrand 221–22.

Alexander Hamilton, in the Federalist, Nos. 83, 84.

Cf. James Iredell, in the North Carolina Convention, Monday, July 28, 1788, 4 Elliot's Debates (1854) 145, 166, 171.

And James Madison, on June 8, 1789, in proposing constitutional amendments at the first session of the first Congress, referred to trial by jury as one of the great rights of the citizen, but without the slightest reference to any necessity of imposing it upon a citizen against his will. (1 Annals of Congress 436, 437, 440–441.)

In the interpretation of Article III, Section 2, it is important to keep in mind the fact that the original Constitution did not contain an express Bill of Rights. On the other hand bill of rights material was scattered all through the document, though not phrased in terms of "right." One of the objections to the Constitution that was voiced before its ratification was that it did not contain a Bill of Rights. This Hamilton answered (Federalist, No. 84), by saying that the points ordinarily provided for by a Bill of Rights were already expressly covered in the Constitution itself—referring, among other things, specifically to Article

III, Section 2, on the question of trial by jury. He wrote:

> The Truth is * * * that the Constitution is itself, in every rational sense, and to every useful purpose, *a bill of rights* * * *. And the proposed Constitution, if adopted, will be the bill of rights of this Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the Government? This is done in the most ample and precise manner in the plan of the Convention. * * * Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention.

(c) WAIVER OF TRIAL BY JURY, EVEN IN TRIALS FOR SERIOUS OFFENSES, WAS NOT UNKNOWN AT THE TIME OF THE ADOPTION OF THE CONSTITUTION

There is a very respectable body of evidence to show that waiver of trial by jury with a resulting trial by the court was not unknown in colonial times.

The first volumes of reported cases published in America did not appear until 1789. These were Kirby's reports in Connecticut and the first volume of Dallas in Pennsylvania. Later reports contained accounts of a few cases before that year, but altogether only a handful of decisions in American criminal cases prior to 1790 have been reported. In more recent years, historical and other learned societies have published some of the records of a few colonial courts, but practically without exception

these records so far printed do not extend later than the seventeenth century. But in these very limited records of the colonial courts, a surprising number of examples of waiver of jury trial are found. Examination of what few sources are available shows that in Massachusetts, Vermont, Connecticut, Maryland and Pennsylvania, at least, there is evidence of a practice in the period prior to, or substantially contemporaneous with, the adoption of the Constitution to allow the defendant to waive trial by jury, and to be tried by the court if he so desired.

Massachusetts. The history of waiver of jury trial in criminal cases in colonial Massachusetts is set forth in considerable detail in an article entitled "To What Extent is the Right to Jury Trial Optional in Criminal Cases in Massachusetts" by F. W. Grinnell, in 8 Massachusetts Law Quarterly, No. 5, p. 7 (1923). Some of the material appears in the opinion in *Commonwealth* v. *Rowe*, 257 Mass. 172, *supra*. The following is summarized from Mr. Grinnell's article, with a few additions.

The first document resembling a constitution in Massachusetts was the "Body of Liberties" of 1641, printed in the volume of Colonial Laws of Massachusetts (Boston, 1889) 29. Liberty XXIX reads as follows:

> In all actions at law it shall be the libertie of the plaintife and defendant by mutual consent to choose whether they will be tryed by the Bench or by a Jurie, unlesse it be where the law upon just reason hath otherwise determined. *The like libertie shall be granted to all persons in Criminall cases.* (Italics ours.)

This "Libertie" appears in practically identical language in later compilations of the laws of colonial Massachusetts. Laws and Liberties of Massachusetts of 1648 (reprinted in Cambridge in 1929), p. 51; Revision of 1660, p. 77, and Revision of 1672, p. 152, reprinted in the "Colonial Laws of Massachusetts" above referred to.[4] A similar provision is found likewise in the laws of Plymouth Colony for 1671. (See The Compact, Charter and Laws of the Colony of New Plymouth (Boston, 1836), 242.)

That this provision was in fact carried into practice in criminal cases in the courts in Massachusetts appears from the "Records of the Court of Assistants," volume I of which was published by the county of Suffolk, Massachusetts, in 1901. This volume covers the period from 1673 to 1692. In nearly all of the criminal cases recorded the trial was by jury, and the record states specifically that "the prisoner at the barr pleaded not guilty and put himself on his tryall by God and the Country." There are, however, several cases in which it expressly appears that the defendant waived a jury trial and was tried by the Bench.

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[4] In the report of the Commissioners of Charles II for alteration and necessary amendments in the Massachusetts laws of 1660 no mention was made of the provision in those laws for trial of criminal cases by the bench. See 4 Records of Massachusetts Bay (Part 2), p. 211. And in the opinion by the Attorney and Solicitor General on objectionable provisions in the Massachusetts laws of 1672 there is no reference to the provision as to trial by the bench as objectionable. See Record Office, London, Colonial Papers, Vol. 41, reprinted in 2 Laws of New Hampshire, Province Period, 796.

On page 102 of this volume appears the record of the trial of Walter Gendall in 1676, which involved a serious offense and a severe punishment. This record reads as follows:

Walte^{r} Gendall his Indictm^{t}

Walter Gendall of or neere blacke point being presented & Indicted by the Grand Jury & left to triall = was brought to the Barr & was Indicted by the name of walter Gendall for no^{t} hauing the feare of God before his eyes & being Instigated by the Divill in the tjme of the warr wth the Indians in a perfidious & treacherous way against the Inhabitants of this Collonyes peace and safety sought to betray them into the ennemyes hands by his Indeavo^{r} & Counsell Contrary to the peace of our Soueraigne Lord the King his Croune & dignity & the law of this Commonwealth to w^{ch} Indictmen^{t} he pleaded not Guilty Refferd himself for his tryall to the Bench.

his Censure

The magistrates hauing duely weighed the Indictment & euidences in the Case produced against him found him Guilty of the Indictmen^{t} & doe therefore sentence yow to Runn the Gantelop thro the millitary Companyes in Boston on the 10th Instant wth a Roape about his necke that he forfeit all his lands to the Country and be banished out of this Jurisdiction to be gonn by y^{e} 6th of octobe^{r} nex^{t} on poenalty of perpetuall Imp^{r}isonmen^{t} if he Returne Againe & dischardging the Costs & charges of the prosecution:

Immediately following this is the case of John Watts, involving a similar offense, where again it appears that the defendant elected to be tried by the court rather than by a jury. The record in this case is given below:

Jn° watt[s] Indictment

Jn° watt[s] being presented & Indicted by the Grand Jury was brought to the Barr & was Indicted by the name of John watts marriner for not hauing the feare of God before you[r] eyes being Instigated by the Divill in the tjme of the warr w[th] the Indians did in a perfydious & treacherous way against the Inhabitants of this Colony[s] peace & safety to betray them into the ennemyes hands & hath in or about June last traded powde[r] & shott whereby the enemy hath binn supplyed Contrary to the peace of ou[r] Soueraigne Lord the King his Croune & dignity & y[e] Act of the Council of this Commonwealth.

1677

Watts censure

To wch Indictment he pleaded no[t] Guilty put himselfe on his Tryall by God & the bench The Court on consideration of all the euidences in the case produced doe sentence yow to Runn the Gantelop thro the Company[s] that trayne in Boston on second day nex[t] being the 10[th] Instant & Give in his bond of one hundred pounds for his Good behauiour & pay the Costs & charge of the

prosecution standing comitted till the sentence be performed=

On page 104 is printed another record of a trial by the court rather than by a jury. It appears that William Pope, charged with "abusive Carriage in Cursing of the Authority here making an orde^{r} to prevent the spreading of y^{e} smale pox: as also defaming all the weomen in Boston" was "no^{t} willing to be trjed by a Jury but reffering himself to the Gouernc^{r} & magistrates The Court declared they had Considered of his offences & sentenct him to be whip^{t} wth twenty stripes or to pay twenty ma^{r}kes fine in money to y^{e} Country Treasurer standing Comitted till the sentanc be performd."

Three more cases of trial by the court appear on pages 114–15 of this volume of "Records." The first is the case of Samuel Hunting who was indicted for manslaughter and "Refferd himself to the Bench as to his triall." The next case is that of Darby Bryan who was indicted for adultery, who "pleading not Guilty on the question whom he would be trjed by sajd by the Bench." The third of these cases is that of Abigail Johnson, who likewise was indicted for adultery; "she pleaded not Guilty & put hirself on the triall on the bench."

The final cases recorded in this volume (pp. 285–86) as being tried by the court are those of "Joseph Homes Sen & Jun" who were charged with receiving stolen property. The record shows that on September 17, 1685, they "were Called & appeared & it being put to them whither they would be trjed by the

Bench or by Jury, they each after othe[r] refferd themseulues to the Bench." (See also the cases of Benanuel Bowers, on page 3, and of Robert Maior, on page 84.)

In *Commonwealth* v. *Rowe*, 257 Mass. 172, *supra*, the court (p. 179) refers to the fact that from 1694 onward there is no record of a trial of a serious criminal offense without a jury. This may be explained by the fact that no records of criminal cases in this period have been printed, and is, we submit, no evidence that the practice did not continue. The first recorded evidence of a change is in the Revised Statutes of 1835, when it was provided (c. 123, § 3) that "No person indicted for an offense shall be convicted thereof, unless by confession of his guilt in open court, or by admitting the truth of the charge against him, by his plea or demurrer, or by the verdict of a jury, accepted and recorded by the court;" and concomitantly (c. 136, § 28) that "When any person is arraigned upon an indictment, it shall not be necessary, in any case, to ask him how he will be tried."

New Hampshire. By the Cutt Laws of 1679 (1 New Hampshire Province Laws 25) it was provided:

> It is further enacted; That all Trials, whether Capital, or Criminal, or between man & man, both respecting maritime affairs, as wel as others, be tried by a Jury of Twelv good & Lawful men, according to the commendable custom of England Except the Parties concerned do refer it to the Bench; * * *.

It is probable that these laws never received the royal assent, but they may nevertheless indicate the sentiment in the Colony at the time.

Vermont. No reports of cases decided in Vermont were published until the nineteenth century. In 1823, however, William Slade, Jr., then Secretary of State of Vermont, published a volume called "Vermont State Papers." At the close of this volume are a few records of the Supreme Court of Vermont; in all somewhat less than ten criminal cases are recorded. In one of these (p. 553) it appears that a trial held July 1, 1779, was before the court without a jury. The three defendants, whose names are indicated only by dashes, were charged with harboring and concealing two persons who had before joined the open enemies of Vermont and the United States. At the trial, the record shows:

> The delinquents being brought into court, and put to plead, ——— ——— pleads not guilty, but ——— ——— and ——— ——— plead guilty, and put themselves upon the court for trial. — The court having heard the evidence and fully considered the cause, gave judgment that said delinquents are guilty * * *.

Article XXII of Chapter II of the Vermont Constitution of July 2, 1778, provided that "Trials shall be by jury." That constitution was never submitted to the people, but it was silently submitted to for many years. (See Slade, Vermont State Papers 241; Young, Address to the Inhabitants of Vermont 76.)

It is also true that Vermont was not represented at the Constitutional Convention, but was admitted into the Union as a State in 1791. Its practice is some indication of the thought at the time of the adoption of the Constitution.

Connecticut. The reports of Connecticut criminal cases in the last decade of the eighteenth century show clearly that it was the practice there to allow a defendant to waive his right to trial by jury, if he so desired, even in the case of serious crimes. The clearest example is found in the case of *State* v. *Taylor and Warren*, 1 Root 226, decided in New London County, Connecticut, in September Term, 1790. The complete report of the case reads as follows:

> INFORMATION for a burglary, charging them jointly with the facts: They severally plead not guilty. Taylor put himself on the country for trial, and Warren put himself on the court; the evidence being the same in both, the case was ordered to proceed as to both, the jury to be charged with one issue, and the court tried the other.

In two other of the few criminal cases in Root's reports it appears that the facts were tried by the court rather than by a jury. In *State* v. *Shaw and six others*, 1 Root 134, decided in 1789, the report begins: "INFORMATION for a riot. Not guilty plead. Issue to the court." And in *State* v. *Ford*, 2 Root 93, decided in 1793, the first paragraph of the report reads: "INFORMATION for forging certain notes. Plea not guilty. Issue to the court."

New Jersey. In 1738 the legislature of New Jersey enacted a statute authorizing any two magistrates to try persons charged with larceny of goods under the value of twenty shillings. (1 Nevill, New Jersey Laws, c. LIX, p. 235.) The statute was in substance a provision for waiver of trial by jury (see *Edwards* v. *State*, 45 N. J. L. 419, 422), for Section 5 of the Act read:

> 5. PROVIDED ALWAYS, And be it further enacted by the Authority aforesaid, that if the Person or Persons so accused of committing such Larceny as aforesaid, shall make it his, her or their Choice and Request to the said Magistrates, to be tried as by the Course of Law before the making this Act, he, she or they shall be remanded, by the said Magistrates, to the Gaol aforesaid, there to be kept to that End.

The duration of this statute was extended in 1741 (1 Nevill, Laws of New Jersey, c. LXXII, p. 272) and it remained in effect until 1796, after the adoption of the Federal Constitution. Although it was repealed in that year, it was in substance reenacted with only minor changes. (Paterson, Laws of New Jersey, pp. 213, 221, Secs. 32, 79.)

Maryland. The history of the Maryland practice of waiver of jury trial in criminal cases has been set out in an article by Hon. Carroll T. Bond, Presiding Judge of the Maryland Court of Appeals, entitled "The Maryland Practice of Trying Criminal Cases by Judges Alone, without Juries," in the American Bar Association Journal for November, 1925 (11 A. B. A. J. 699). Judge Bond shows that the present

Maryland practice is "a development from the ancient English practice of submission to a fine on a charge not capital and punishable by fine, without contesting the charge, the practice which survives in some jurisdictions under the name of *nolo contendere*."

The history of this procedure has been so recently set forth by this Court in *Hudson* v. *United States*, 272 U. S. 451, that repetition thereof is not necessary here. In substance it is similar to a waiver of jury trial. The plea is not the same as a plea of guilty; it does not lead directly and without more to judgment. Instead the court proceeds to hear evidence and to determine facts. The plea authorizes the court to impose a sentence, even of imprisonment, if it finds the facts warrant such action. The court, on the other hand, may discharge the defendant. The plea thus substitutes the court for the jury as the trier of the facts.

The earliest records of criminal trials without juries in Maryland appear to be those of the Baltimore County Court of 1693 and 1694 where entries are found that the defendant "Pleaded not guilty and put himself upon the Court," whereupon the court without a jury found him guilty or not guilty (11 A. B. A. J. 699). Within the next fifty years the form seems to have changed to that of submission, but the substance appears to remain the same. Many records of trials upon submission appear in the Baltimore County Court for 1743 and for 1750 (*ibid.*). In the

latter year it is recorded that Lawrence Cox, "being demanded how he will acquit himself of the matter whereof he stands presented he the said Lawrence protesteth that he is innocent but humbly submits himself to the Grace of the Court here. Whereupon the said Lawrence is discharged, paying the several officers of this Court their several and respective fees." And in the case of Henry Brereton, on a charge of stopping the main road, the record shows the submission to the grace of the court, and then continues, "Therefore it is considered and adjudged by the Justices of the Court here that the said Henry Brereton is not guilty thereof whereupon he is accordingly discharged, * * *." And similar entries are found in many other cases. (*Ibid.*) These records show the close connection between this practice and that of which traces are found in the English books; yet the fact that the defendants were on occasion found not guilty and discharged shows that in substance the situation was one of waiver of jury trial, with the trial of facts by the court.

The Maryland reports show several more cases in which this procedure was followed during the eighteenth century. *Jenifer* v. *The Lord Proprietary*, 1 Harris & McHenry 535, was an appeal from a conviction in 1769 on a charge of collecting excessive fees as sheriff. The report shows that the defendant submitted to the lower court, that evidence was heard, and that "*The Court*, upon this evidence, gave judgment against the said *Jenifer*." The question before the appellate court was whether an appeal or

writ of error was the proper procedure, and this was not decided. That either an appeal or writ of error would be proper shows the essential difference between the procedure here involved and that arising on a plea of guilty.

The case of *Miller* v. *The Lord Proprietary*, 1 Harris & McHenry 543, was decided in 1774. The defendant was charged with throwing ballast into a channel of the Potomac River. The report shows that at the trial in 1770 the defendant "submitted himself to the grace of the Court (under a protestation of innocence)," and that he was fined fifty pounds. On a writ of error the court reversed the judgment without opinion.

Another example is *State* v. *Tibbs*, 3 Harris & McHenry 83, tried below in 1791. Here again the defendant "submitted to the court." He was convicted and fined, but the Court of Appeals in 1793 reversed the judgment on writ of error.

Besides these cases decided by the courts, this procedure was sanctioned by the legislature. Chapter XI of the Laws of 1781 was entitled "An Act relating to costs in criminal cases," and read in part as follows:

> Whereas it is unjust and oppressive, that any person who may be prosecuted for any crime of which he is not guilty should be burthened with the costs and charges accruing on the prosecution:
>
> *Be it enacted, by the General Assembly of Maryland*, That no person who may be

> prosecuted for any misdemeanor or offence, and *discharged by the court on submission*, or fined not exceeding one shilling current money, or prosecuted for any crime and acquitted on trial by a jury, shall be burthened with the payment of any costs or fees accruing on such prosecution, * * *. (Last italics ours.)

The Maryland practice since the eighteenth century has had a continuous development into the modern trial by the court. In the year 1924 over 90 per cent of all the cases tried in the Criminal Court of Baltimore City were tried without a jury (11 A. B. A. J. 701) under this procedure which finds its origin quite definitely in the provincial practice.

Pennsylvania. The case of *Proprietor* v. *Wilkins*, decided January 3, 1685/6, and reported on page 88 of the volume of Pennypacker's Colonial Cases, published in Philadelphia in 1892, is not without significance, although involving a plea of guilty. It appears that the defendant, after pleading guilty, "was asked by whom she would be tried and she answered: 'By the bench of Justices without a petty jury.' Samuel Hersent, attorney for the king, governor, and prosecutor, thereupon raised an interesting question of law. He contended 'yt it was contrarie to ye law to try ye prisoner wtout a pettie jurie * * * .' The court, however, overruled the application, tried her themselves, and sentenced her to pay a fine of ten pounds, to give security, and pay the costs."

The Pennsylvania reports show that the English practice of submission, above discussed, was not unknown, and this may be the explanation of the case above cited. In *Respublica* v. *Askew*, 2 Dallas 189 (1792), it is reported that:

> The defendant was indicted for a libel; and at the last *Nisi Prius*, retracted his plea and submitted, protesting his innocence, &c.

From the above it is plain that waiver of jury, even in trials for serious offenses, was not unknown at the time of the adoption of the Constitution. Recognition of the right of waiver in cases where the defendant deemed it to his interest so to do could not therefore have been regarded as inconsistent with the institution of trial by jury. The language of the Constitution is brief and general. We submit that from the history of the conditions which gave rise to the constitutional guaranty it is manifest that the evil to be guarded against was the denial of the right to jury trial, and that the judicial history of the Colonies indicates that there was no sentiment against the waiver of such right. The practice of waiver being known, stronger language would have been used had there been any intention to preclude it.

II

As to the Question Whether, Apart from Constitutional Considerations, Waiver of the Entire Jury in Felony Cases Is Authorized by the Present Federal Statutes

It may be argued that, even though waiver of the entire jury in advance of trial might validly be authorized under the Constitution, the court has no

jurisdiction to try a felony case without jury under the present statutes.

It is true that the weight of State court authority tends to support that view. While in a few cases (involving misdemeanors) State courts have held that trial by jury might be waived in the absence of statutory authority therefor (*Zarresseller* v. *People*, 17 Ill. 101; *Darst* v. *People*, 51 Ill. 286; see *State* v. *Potter*, 16 Kan. 80, 97; *Metzner* v. *State*, 128 Tenn. 45; *Miller* v. *State*, 116 Neb. 702), the greater number of such decisions hold that waiver of the entire jury is invalid either because the statutes relating to jury trial are construed to be mandatory or because no express provision is made by statute for waiver. *Wilson* v. *State*, 16 Ark. 601; *State* v. *Maine*, 27 Conn. 281; *State* v. *Carman*, 63 Iowa 130; *Commonwealth* v. *Rowe*, 257 Mass. 172; *Neales* v. *State*, 10 Mo. 498; *Commonwealth* v. *Hall*, 291 Pa. 341; *State* v. *Hirsch*, 91 Vt. 330; *Mays* v. *Commonwealth*, 82 Va. 550; *State* v. *Smith*, 184 Wis. 664. The usual ground of such decisions is that "While a defendant may waive his right to jury trial, he can not by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law." *Harris* v. *People*, 128 Ill. 585, 591.

There are no decisions of this Court which lend support to the view that the absence of express statutory provision for the waiver of a jury or the existence of statutory provisions prescribing jury trial deprives the court sitting without a jury of jurisdiction. Indeed, its decisions tend to uphold the

validity of such a waiver under the general statutes prescribing trial by jury in the lower Federal courts.

The first Judiciary Act (Act of September 24, 1789, c. 20, Secs. 9, 12, 1 Stat. 73, 77, 80) contained general provisions for jury trial in all except some civil cases. Criminal cases and most of the civil cases were treated alike:

> SEC. 9. * * * And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.
>
> SEC. 12. * * * and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.

These provisions were carried into Sections 566 and 648 of the Revised Statutes, which are more fully printed *supra*, pp. 2–3. Since 1789 the only substantial change to which they have been subjected, so far as criminal cases are concerned, has been the transfer of jurisdiction from the circuit to the district courts. (Judicial Code, Sec. 291.) As a result of this consolidation of the circuit and district courts the two sections have, in the United States Code, been replaced by one. U. S. C., Title 28, Sec. 770.

Under these statutory provisions it has been held by this Court in both criminal and civil cases that a court sitting without a jury is fully organized and has jurisdiction to determine the controversy before it.

In *Schick* v. *United States*, 195 U. S. 65, the defendants were prosecuted in the District Court for

offenses under the oleomargarine laws. After a conviction, the case was brought to this Court on writ of error. The opinion of this Court states (p. 67) that "In each case the parties in writing waived a jury and agreed to submit the issues to the court." The defendants did not assign the absence of the jury as error, but the fact of the waiver appeared in the record, and the question of its effect upon the judgment was fully considered by this Court, which sustained the validity of the conviction, saying (p. 67):

> We entertain no doubt that the parties could rightfully make such a waiver, and that the judgments are in no way invalidated thereby.

The constitutional question was not the only one passed upon by this Court. It also decided (pp. 70–71) that:

> There is no act of Congress requiring that the trial of all offences shall be by jury, and *a court is fully organized and competent for the transaction of business without the presence of a jury*. (Italics ours).

Schick v. *United States*, then, is not alone a decision on the *constitutional* question; it is likewise a decision that there is no *statutory* obstacle to the validity of waiver of jury trial in criminal prosecutions.

The statutory provisions quoted above are applicable both to civil and criminal cases. This Court has on frequent occasions upheld waiver of trial by jury in civil cases under these provisions as they were orig-

inally enacted and as revised. Thus in *Guild* v. *Frontin*, 18 How. 135, the Court said:

> Parties may, by consent, waive the trial of issues of fact by a jury, and submit the trial of both facts and law to the court. It will not be a mistrial.

And in *Campbell* v. *Boyreau*, 21 How. 223, this Court held that if the parties waived trial by jury and left to the court the decision of the facts the court would not lose jurisdiction of the subject matter or of the parties. See also *Rogers* v. *United States*, 141 U. S. 548, 556, and *Campbell* v. *United States*, 224 U. S. 99, 105.

In 1865 (Act of March 3, 1865, c. 86, Sec. 4, 13 Stat. 500, 501; R. S., Secs. 649, 700; U. S. C., Title 28, Secs. 773, 875) Congress authorized the trial of facts without a jury in civil cases upon the filing of a *written* stipulation for the waiver of the jury, and provided for the review of the decisions in such cases upon questions of law. But trials in civil cases without juries under waivers which are not in writing are still permissible, although in such cases the only questions open on appeal are those which arise on the process, pleadings, or judgment. *Kearney* v. *Case*, 12 Wall. 275; *Bond* v. *Dustin*, 112 U. S. 604, 606; *Commissioners of Road District* v. *St. Louis S. W. Ry. Co.*, 257 U. S. 547, 562; *Law* v. *United States*, 266 U. S. 494, 496; *Duignan* v. *United States*, 274 U. S. 195, 198.

These cases are of significance on the *statutory* question, because of the fact that the statutory pro-

visions relating to jury trial (so far as oral waivers are concerned) are the same in both civil and criminal cases.

The result of the cases above cited is that the court, sitting without a jury upon the waiver of the parties, has jurisdiction and is fully organized to try the case. No mistrial results. But the effect of the adoption of such procedure is to make the decision of the trial judge nonreviewable, except as to questions arising on the process, pleadings, or judgment, unless the jury is waived in writing under the provisions of the Act of March 3, 1865, which applies only to civil cases. There is no reason to suppose that the right of review in a criminal case, whether on written or oral waiver, would be any broader than the review of a civil trial on oral waiver. While logically the decision in the *Schick case* is broad enough so far as statutory, as distinguished from constitutional, considerations are concerned, to cover a conviction for any crime by the court in the absence of a jury, the fact remains that it did involve only a petty offense. This Court may well hesitate to extend the principle to cover trials of serious crimes, involving severe punishment, if the result would be that the defendant would have no right to a review of the judgment of conviction, except as to the sufficiency of the indictment to support the judgment.

If the question whether the present Federal statutes permit waiver of the entire jury in advance of trial in felony cases is deemed to be involved in this case, that question is submitted for the decision of the

Court. For the reasons which will be stated in the next point, it is our view that the facts of the present case do not necessitate a decision of that question.

III

On the Facts of the Present Case there Has Been No Substantial Departure from the Mode of Trial by Jury. Even if Waiver of the Entire Jury in Advance of Trial Were Held to Be Unauthorized Either by the Constitution or by the Statutes, Defendants' Right to Waive an Irregularity of the Sort Here Involved Should Be Recognized

In the present case the trial had proceeded for a week before illness prevented further service of the twelfth juror. It was at the suggestion of defendants' counsel, and with their personal consent, that a mistrial was not declared. (R. 2–4.) The defendants' desire to proceed to a conclusion with the re-remaining eleven jurors was wholly natural. Ordinarily a defendant would not desire a retrial. In the usual case heavy expenses would already have been incurred. The additional expense of a new trial might exceed his resources. If he were unable to secure bail, the probable delay would bear heavily upon him. Witnesses, often assembled with difficulty, might be unavailable at a second trial. In this case, those defendants who were acquitted certainly gained by the waiver. Their interests are not subserved by a suggestion that the court was without jurisdiction.

The considerations above stated have led many State courts to hold that where, through unavoidable and unforeseeable circumstances, a juror has become unable to serve, the defendant may validly waive his continued presence and the verdict of the remaining eleven is valid. Many of these cases were decided on grounds equally applicable to the waiver of the entire jury. But in others the rationale of the decision seems to be that there has been a substantial compliance with the system of trial by jury.

In the following cases a verdict rendered by eleven members of a jury with the consent of the defendant was upheld:

Iowa: *State* v. *Kaufman*, 51 Iowa 578 (uttering forged note); *State* v. *Grossheim*, 79 Iowa 75 (assault with intent to commit rape); *State* v. *Browman*, 191 Iowa 608 (murder).

Massachusetts: *Commonwealth* v. *Dailey*, 12 Cush. 80 (assaulting an officer); *Commonwealth* v. *Lawless*, 258 Mass. 262 (misdemeanor).

Minnesota: *State* v. *Sackett*, 39 Minn. 69 (misdemeanor).

Nebraska: *Miller* v. *State*, 116 Neb. 702 (misdemeanor).

Nevada: *State* v. *Borowsky*, 11 Nev. 119 (misdemeanor).

Ohio: *State ex rel. Warner* v. *Baer*, 103 Ohio St. 585 (manslaughter).

Pennsylvania: *Commonwealth ex rel. Ross* v. *Egan*, 281 Pa. 251 (offenses connected with a

bank robbery); *Commonwealth* v. *Beard*, 48 Pa. Super. Ct. 319 (conspiracy).

South Dakota: *State* v. *Ross*, 47 S. D. 188 (misdemeanor); *State* v. *Tiedeman*, 49 S. D. 356 (adultery).

On the other hand, a number of State decisions have taken the opposite position. Some of these cases are distinguishable for it appears that the trial began with less than twelve jurors. *Cleghorn* v. *State*, 22 Ala. App. 439; *Brown* v. *State*, 16 Ind. 496; *Hunt* v. *State*, 61 Miss. 577; *State* v. *Sanders*, 243 S. W. 771 (Mo.). See also *State* v. *Wyndham*, 80 W. Va. 482. But in other cases it appears that the presence of the twelfth juror was waived during the course of the trial.

Indiana: *Allen* v. *State*, 54 Ind. 461 (larceny).

Missouri: *State* v. *Mansfield*, 41 Mo. 470 (burglary).

New York: *Cancemi* v. *People*, 18 N. Y. 128 (murder).

North Carolina: *State* v. *Rogers*, 162 N. C. 656 (murder).

South Carolina: *State* v. *Hall*, 137 S. C. 261 (murder).

Texas: *Jones* v. *State*, 52 Tex. Cr. 303 (murder); *Dunn* v. *State*, 88 Tex. Cr. 21 (murder).

Washington: *State* v. *Ellis*, 22 Wash. 129 (robbery).

Wisconsin: *Jennings* v. *State*, 134 Wis. 307 (misdemeanor).

In Kansas the waiver of one juror during the trial has been held valid in the case of a misdemeanor (*State* v. *Wells*, 69 Kan. 792), but invalid in that of a felony. *State* v. *Simons*, 61 Kan. 752.

In Kentucky it was early held that the defendant might waive the presence of one juror during the course of a trial of a misdemeanor even of a rather serious nature. *Murphy* v. *Commonwealth*, 1 Met. 365; *Tyra* v. *Commonwealth*, 2 Met. 1 (stabbing with intent to kill). In 1893 the Kentucky legislature provided by statute (now Ky. Stat., Sec. 2252) that "the parties to any action or prosecution, except for felony," might agree to a trial by less than twelve jurors. Under this statute the waiver of a juror in a misdemeanor prosecution was upheld in *Phipps* v. *Commonwealth*, 205 Ky. 832. On the authority of the statute, felony prosecutions which commenced before juries of less than twelve have been held invalid. *Branham* v. *Commonwealth*, 209 Ky. 734; *Jackson* v. *Commonwealth*, 221 Ky. 823.

There is a conflict of decisions under the Federal Constitution. The waiver of two jurors during a long trial was held invalid (though not without a vigorous dissent) in *Dickinson* v. *United States*, 159 Fed. 801 (C. C. A. 1st). A similar result was reached by a territorial court in a prosecution for murder where one juror was waived during the trial. *Territory* v. *Ah Wah*, 4 Mont. 149. But in *Territory* v. *Soga*, 20 Hawaii 71, it was held that the United States Constitution did not make invalid the waiver of the presence of one juror during a trial for conspir-

acy. In *Territory* v. *Ortiz*, 8 N. M. 154, a prosecution for a felony which began before a jury of eleven was held invalid.

In all of the State court cases cited above, in which it was held that the defendant might during the course of the trial waive the presence of one of the jurors, the result was reached without the aid of any statute contemplating such procedure. And in Iowa, Massachusetts, Nevada, and Pennsylvania the defendant's waiver of the presence of the twelfth juror was upheld, even though his waiver of the entire jury would not have been sustained because of applicable statutory provisions.

Iowa. State v. *Kaufman*, 51 Iowa 578, was a prosecution for uttering a forged note. During the course of the trial one of the jurors became ill and was discharged with the consent of the defendant, who also consented that the trial continue before the remaining eleven. The Supreme Court, in sustaining the conviction, called attention to the statute then in force, which provided that "the jury consists of twelve men, accepted and sworn to try the issue," but held it not conclusive, saying (p. 579) that it was settled, "that a defendant in a criminal action, with the consent of the State and court, may waive a statute enacted for his benefit." Having thus disposed of the statutory question, the court held further that the constitution presented no barrier to the waiver, saying (p. 580):

> The defendant may have consented to be tried by eleven jurors, because his witnesses were

> then present, and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they may desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule. It may be said that if one juror may be dispensed with, so may all but one, or that such trial may be waived altogether, and the trial had to the court. This does not necessarily follow. It will be time enough to determine such questions when they arise.

A few years later the Iowa court decided, upon statutory grounds, in *State* v. *Carman*, 63 Iowa 130, that the defendant might not waive the entire jury and be tried by the court alone, and this was followed in *State* v. *Sanigan*, 66 Iowa 426. Nevertheless, the court continued to follow its decision as to the waiver of the twelfth juror, and in *State* v. *Grossheim*, 79 Iowa 75, which involved that question in a trial for assault with intent to commit rape, the conviction was upheld. A similar result was reached in a trial for murder in *State* v. *Browman*, 191 Iowa 608; but, on the other hand, the waiver of the entire jury was again declared invalid in *State* v. *Williams*, 195 Iowa 374, and in *State* v. *Stricker*, 196 Iowa 290.

Massachusetts. In *Commonwealth* v. *Dailey,* 12 Cush. 80, the defendant consented to the withdrawal of a juror during his trial for an assault upon an officer. The conviction was upheld in an opinion by Chief Justice Shaw. Distinguishing the question of the power of the defendant to waive the entire jury, it was held that in any event the defendant might waive the continued presence of a juror who became incapacitated during the trial. The court said (p. 82):

> In the case supposed, the accused may have been successful in laying before the jury all his evidence, which he may fear he can not again obtain. A long time may elapse before he can have another trial, and it is important to him to have an early decision, on many accounts. In the admission and rejection of evidence, in many points in the conduct of a trial, parties and their counsel, we think, may be safely allowed to judge as to what they will insist on and what they will waive. Having so done, and taken their chance for a verdict, it would be inconsistent with ordinary good faith and fair dealing to turn round and insist on legal exceptions, which they had pledged themselves to the court that they would not take.

Then, after discussing various authorities, the court concluded (p. 84):

> Under the circumstances of the case, the court are of opinion, that on the trial of a conspiracy, supposing it an irregularity to take

> the verdict of eleven jurors without the consent of both parties, yet as it did not affect the jurisdiction of the court, the exception was one that the accused might waive; that having stipulated of record, that he would take no exception to such irregularity, he is now precluded from taking it, and therefore that the verdict must stand.

The question of the power of the defendant to waive the entire jury and be tried by the court alone was presented to the Massachusetts court in *Commonwealth* v. *Rowe*, 257 Mass. 172, *supra*. As has been before pointed out (pp. 20–21, *supra*), it was there decided that although there was no constitutional objection to such a waiver, it could not be validly made under the existing statutory provisions.

Almost immediately thereafter the eleven juror problem again arose, and in *Commonwealth* v. *Lawless*, 258 Mass. 262, the court distinguished *Commonwealth* v. *Rowe*, and followed the decision in *Commonwealth* v. *Dailey*.

Nevada. *State* v. *Borowsky*, 11 Nev. 119, was a prosecution for misappropriation of funds while acting as public administrator. The defendant was convicted by the verdict of eleven jurors, the presence of the twelfth juror having apparently been waived before trial. The conviction was upheld. The court observed (p. 127) that "it seems to be implied in the language of the constitution (art. 1, sec. 3) and expressly enacted in the law (Comp. L., secs. 1679, 1687) that on the trial of an indictment a jury can not be waived." But the court continued:

> There is certainly much apparent and perhaps real force in the argument that a trial by eleven jurors is no jury trial, but there is very strong authority for holding the defendant estopped in a case like this from saying that it is not, and in my opinion it ought to be so held if there is any reasonable ground for such a decision. To hold otherwise would seem to involve the conclusion that if a verdict of guilty does not convict, a verdict of not guilty does not acquit, and that in the latter case the defendant might be tried again perhaps after his witnesses had gone beyond his reach, and in a case perhaps where the very reason of his waiving a full panel of jurors was to prevent a postponement of his trial and the loss of important testimony. These considerations, it is true, do not meet the argument, but they indicate the unjust and harsh consequences involved in the position contended for and the motives which may legitimately actuate a court in inclining to an opposite conclusion.

Pennsylvania. In *Commonwealth* v. *Beard*, 48 Pa. Super. Ct. 319, the defendant, charged with conspiracy, waived the presence of one juror during the trial and a conviction by the remaining jurors was upheld. A few years later the question was presented to the Supreme Court on habeas corpus in *Commonwealth ex rel. Ross* v. *Egan*, 281 Pa. 251. The court observed (p. 254) that "rulings on the point in the various states are irreconcilable." After

citing and quoting from some of these conflicting cases, the court said (pp. 256–257):

> The theory upon which the opposing cases are decided seems to rest on the proposition that society at large is as much interested in an impartial trial of a defendant, who may be sentenced to imprisonment, as he himself is, and therefore no permission to waive any right, when charged with a felony, should be accorded to him. There may be reason for applying this rule to capital cases, as has been done in Pennsylvania, but such a principle ought not to be invoked to relieve those charged with lesser offenses, such as larceny (though technically denominated a felony), from the consequences of their own voluntary act, and where it appears by the record that consent to the course pursued was freely given, the defendant should not be heard thereafter to complain. * * * The solution of the question depends upon the determination whether a trial by less than twelve is an irregularity or a nullity. If the latter be held, no sentence imposed may be sustained, but the contrary is true if the former and correct conclusion be reached.

A few years later the Pennsylvania court, in *Commonwealth* v. *Hall*, 291 Pa. 341, was called upon to decide the question of the validity of the waiver of the entire jury, with trial by the court alone. The court, while recognizing the authority of its earlier decision on the eleven-juror question, decided that under the existing statutes waiver of the entire jury was invalid.

Ohio. In *State ex rel. Warner* v. *Baer*, 103 Ohio St. 585, the court in an elaborate opinion concluded that waiver of the presence of the twelfth juror during the course of a trial for manslaughter might validly be made. The court recognized (p. 589) that the jury contemplated by the Bill of Rights was one composed of twelve men, but upon examination of many decisions from other jurisdictions, decided that the State constitution provided merely a right or privilege which the defendant might waive. It was then said (pp. 609–610):

> It has been urged in argument that these sections of the Bill of Rights are jurisdictional and that jurisdiction cannot be conferred by consent. We agree that jurisdiction cannot be conferred by consent, but we deny that this question has anything to do with jurisdiction. The court of common pleas of Cuyahoga county had full and complete jurisdiction of the subject-matter of the trial. The provisions relating to the right of jury trial refer only to the form and manner of the trial, and are in no sense jurisdictional in character.

In conclusion the court observed (pp. 611–612):

> It is not claimed in this case that the state gained any advantage by proceeding with only eleven jurors, except the proper advantage of saving time and expense; neither is it claimed that any disadvantage resulted to the accused, except the possibility that the juror who was excused might have caused a disagreement. This remote possibility takes us into the realm of conjecture, and if we are to indulge in con-

> jecture it may be conjectured that the defendant and his counsel believed it to be to their advantage to go on with eleven jurors. The excused juror might have been objectionable; the defense may have been well prepared, with witnesses assembled who could not be assembled at a later date; the defendant may have considered the expense which would accrue to himself from another trial. These and numerous other tactical advantages, known perhaps only to himself and his counsel, might make it very important to him to proceed with the trial. To declare as a principle of law that he may not waive his constitutional privileges, and to compel him to forfeit any tactical advantages, would defeat the purposes which the constitutional provisions were designed to serve.

South Dakota. In *State* v. *Ross*, 47 S. D. 188, the defendant was charged with the offense of obstructing justice by preventing the appearance of a witness. During the trial one of the jurors became incapacitated and was discharged, the defendant consenting to continue the case before eleven jurors. The Supreme Court after considering the cases in other jurisdictions upheld the conviction.

In *State* v. *Tiedeman*, 49 S. D. 356, the facts were similar but the defendant sought to avoid the decision in *State* v. *Ross*, *supra*, on the ground that the offense with which he was charged, adultery, was a felony. But the court said (p. 360):

> The constitutional provision which appellant claims is violated here applies equally to fel-

> onies and misdemeanors, and we think this case is ruled by the decision of this court in *State* v. *Ross, supra.* It is true that case involved a misdemeanor only, but it involved the same constitutional provision now before us. "We are unable to see how it is possible to draw a distinction in this respect between misdemeanors and felonies, because the Constitution does not recognize such distinction."

In this Court, the case of *Queenan* v. *Oklahoma*, 190 U. S. 548, bears considerable resemblance to that presented by the present certificate. In that case the defendant had been prosecuted for murder in Oklahoma Territory. During the trial it was discovered that one of the jurors had been convicted of a felony in Nebraska, which under the Oklahoma law disqualified him from serving as a juror in any case. The trial, however, proceeded with the defendant's assent, and he was convicted. The conviction was affirmed, this Court saying (p. 552):

> * * * it was his duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.

If the defendant could waive the disqualification of a juror on the ground that he had committed a felony, why could he not waive a disqualification based on an incompetency of some other kind? Suppose the juror, instead of being a felon, had become ill or mentally incapable of attending to the evidence. *Queenan* v. *Oklahoma* is a case in which, under the

Constitution of the United States, a conviction for the crime of murder was affirmed, although the verdict was concurred in by only eleven qualified jurors, the defendant assenting to the trial proceeding without a proper jury.

That a tribunal consisting of a judge and eleven jurors is not, as defendants contend, without jurisdiction, and that a trial before such a tribunal is not a nullity or a mere arbitration is, we submit, clearly indicated by the case of *Riddle* v. *Dyche, Warden*, 262 U. S. 333. That was an appeal from an order of the District Court discharging a writ of habeas corpus and remanding to custody the appellant, who had been convicted of a felony and sentenced to imprisonment in the penitentiary. The ground upon which the writ of habeas corpus was based was that the jury was illegally constituted of less than twelve men. The record of the District Court in which the conviction was had recited that "a jury of good and lawful men" had been duly empanelled, sworn, and charged. Appellant's unsuccessful efforts to have the record corrected to show that the trial had in fact been held before eleven jurors, and to have the refusal of the District Judge so to amend the record incorporated into a bill of exceptions, appear in the records of two applications made by the appellant in this Court for writs of mandamus (October Term, 1920, No. 27, Original, and No. —, Original), *Ex parte Riddle*, 255 U. S. 450; 256 U. S. 684. This Court held that mandamus was not the proper remedy. The facts regarding

the constitution of the jury not appearing in the bill of exceptions, the point was not considered by the Circuit Court of Appeals in affirming the judgment of conviction (*Riddle* v. *United States*, 279 Fed. 216), and this Court denied an application for a writ of certiorari (259 U. S. 586). In the habeas corpus proceeding this Court again held that appellant's remedy was by writ of error and that "the record may not be contradicted collaterally at least, where, as here, jurisdiction of the cause or parties is not involved" (p. 336). It is submitted that, if the facts alleged as the ground of the writ of habeas corpus had been regarded as tending to show that the tribunal before which Riddle was convicted had no jurisdiction to try the case, this Court would not have regarded the record as conclusive.

Even if it should be held that the Constitution requires trial by jury in the case of all crimes in terms so mandatory that provision for waiver may not validly be made, or that the present statutes preclude any other form of trial, it is submitted that the present case presents no departure therefrom of such a substantial nature that it could not be waived.

In many States recent statutes seek to meet the contingency of jurors becoming disabled by provisions for alternate jurors. California, Penal Code, Sec. 1089; Colorado, Compiled Laws, 1921, Sec. 5850; Idaho, Act of March 9, 1929, c. 141, p. 250; Michigan, Code of Criminal Procedure (Public Acts 1927, No. 175, p. 281), c. 8, Sec. 18; Nevada, Statutes 1920–

1921, c. 204, p. 289; Ohio, General Code, Sec. 11431–1; South Dakota, Session Laws 1929, c. 100, p. 103; Washington, Laws 1917, p. 185, Sec. 1; Wyoming, Session Laws 1927, c. 15, p. 13. It is submitted that where, as in this case, no such provision obtains, a decision that the defendants were without power to meet the exigency by consenting to the trial proceeding before the remaining eleven jurors and to be bound by their verdict would involve hardships which are not necessitated either by the Constitution or by the statutes.

CONCLUSION

The question certified should be answered in the affirmative.

Respectfully submitted.

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OPINION

SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1929.

John Patton, Harold Conant, and Jack Baker, *vs.* The United States of America.	On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[April 14, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

The defendants (plaintiffs in error) were indicted in a federal district court, charged with conspiring to bribe a federal prohibition agent, a crime punishable by imprisonment in a federal penitentiary for a term of years. A jury of twelve men was duly impaneled. The trial began on October 19, 1927, and continued before the jury of twelve until October 26 following, at which time one of the jurors, because of severe illness, became unable to serve further as a juror. Thereupon it was stipulated in open court by the government and counsel for defendants, defendants personally assenting thereto, that the trial should proceed with the remaining eleven jurors. To this stipulation the court consented after stating that the defendants and the government both were entitled to a constitutional jury of twelve, and that the absence of one juror would result in a mistrial unless both sides should waive all objections and agree to a trial before the remaining eleven jurors. Following this statement, the stipulation was renewed in open court by all parties. During the colloquy counsel for defendants stated that he had personally conferred with all counsel and with each of the defendants individually, and it was the desire of all to finish the trial of the case with the eleven jurors if the defendants could waive the presence of the twelfth juror.

The trial was concluded on the following day, and a verdict of guilty was rendered by the eleven jurors. Each of the defendants was sentenced to terms of imprisonment in the penitentiary on the several counts of the indictment. An appeal was taken to the

circuit court of appeals upon the ground that the defendants had no power to waive their constitutional right to a trial by a jury of twelve persons.

The court below, being in doubt as to the law applicable to the situation thus presented, and desiring the instruction of this court, has certified the following question:

"After the commencement of a trial in a Federal Court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government through its official representative in charge of the case consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?"

The question thus submitted is one of great importance, in respect of which there are differences of opinion among the various lower federal and state courts; but which this court thus far has not been required definitely to answer. There are, however, statements in some of our former opinions, which, if followed, would require a negative answer. These are referred to and relied upon by the defendants.

The federal Constitution contains two provisions relating to the subject. Article III, Section 2, Clause 3 provides:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Passing for later consideration the question whether these provisions, although varying in language, should receive the same interpretation, and whether taken together or separately the effect is to guaranty a right or establish a tribunal as an indispens-

able part of the government structure, we first inquire what is embraced by the phrase "trial by jury." That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.

As to the first of these requisites, it is enough to cite *Thompson* v. *Utah*, 170 U. S. 343, 350, where this court reversed the conviction of a defendant charged with grand larceny by a jury of eight men, saying:

"It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the Territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons."

The second requisite was expressly dealt with in *Capital Traction Company* v. *Hof*, 174 U. S. 1, 13-16, where it is said:

"'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

The third requisite was held essential in *American Publishing Company* v. *Fisher*, 166 U. S. 464, 468; *Springville* v. *Thomas*, 166 U. S. 707; *Maxwell* v. *Dow*, 176 U. S. 581, 586.

These common law elements are embedded in the constitutional provisions above quoted, and are beyond the authority of the legislative department to destroy or abridge. What was said by Mr. Justice Brewer in *American Publishing Company* v. *Fisher, supra,* with respect to the requirement of unanimity, is applicable to the other elements as well:

"Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."

Any such attempt is vain and ineffectual, whatever form it may take. See *In re Debs,* 158 U. S. 564, 594.

The foregoing principles, while not furnishing a precise basis for an answer to the question here presented, have the useful effect of disclosing the nature and scope of the problem, since they demonstrate the unassailable integrity of the establishment of trial by jury in all its parts, and make clear that a destruction of one of the essential elements has the effect of abridging the right in contravention of the Constitution. It follows that we must reject *in limine* the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing. In other words, an affirmative answer to the question certified logically requires the conclusion that a person charged with a crime punishable by imprisonment for a term of years may, consistently with the constitutional provisions already quoted, waive trial by a jury of twelve and consent to a trial by any lesser number, or by the court without a jury.

We are not unmindful of the decisions of some of the state courts holding that it is competent for the defendant to waive the continued presence of a single juror who has become unable to serve, while at the same time denying or doubting the validity of a waiver of a considerable number of jurors, or of a jury altogether. See, for example, *State* v. *Kaufman,* 51 Iowa 578, 580, with which compare *State* v. *Williams,* 195 Iowa 374; *Commonwealth ex rel. Ross* v. *Egan,* 281 Pa. 251, 256, with which compare *Commonwealth* v. *Hall,* 291 Pa. 341. But in none of these cases are we able to find any persuasive ground for the distinction.

Other state courts, with, we think, better reason, have adopted a contrary view. In *State* v. *Baer,* 103 Ohio St. 585, a person charged

with manslaughter had been convicted by eleven jurors. The trial began with a jury of twelve, but, one of the jurors becoming incapable of service, the trial was concluded with the remaining eleven. In disposing of the case, the state supreme court thought it necessary to consider the broad question (p. 589): ". . . whether the right of trial by jury, as guaranteed by Sections 5 and 10 of the Bill of Rights, can be waived." After an extensive review of the authorities and a discussion of the question on principle, the court concluded that since it was permissible for an accused person to plead guilty and thus waive *any* trial, he must necessarily be able to waive a *jury* trial.

In *Jennings* v. *State*, 134 Wis. 307, 309, where, again, a juror during the trial was excused from service because of illness, and the case was continued and concluded before the remaining eleven, the Supreme Court of Wisconsin also disposed of the case as involving the power of the defendant to waive a jury altogether, saying:

"It seems necessarily to follow that if a person on trial in a criminal case has no power to waive a jury he has no right to be tried by a less number than a common-law jury of twelve, and when he puts himself on the country it requires a jury of twelve to comply with the demands of the constitution. The fact that the jury in the instant case had the required number of twelve up to the stage in the trial when the cause was to be submitted to them under the instructions of the court cannot operate to satisfy the constitutional demand. At this point the trial was incomplete, for the very essential duty of having the jury deliberate upon the evidence and agree upon a verdict respecting defendant's guilt or innocence remained unperformed. Without the verdict of a jury of twelve it cannot be said to be a verdict of the jury required by the constitution. Such a verdict is illegal and insufficient to support a judgment."

We deem it unnecessary to cite other cases which deal with the problem from the same point of view.

A constitutional jury means twelve men as though that number had been specifically named; and it follows that when reduced to eleven it ceases to be such a jury quite as effectively as though the number had been reduced to a single person. This conclusion seems self evident, and no attempt has been made to overthrow it save by what amounts to little more than a suggestion that by reducing the number of the jury to eleven or ten the infraction of the Constitution is slight, and the courts may be trusted to see that the

process of reduction shall not be unduly extended. But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the Constitution—is only a slight reduction, is not to interpret that instrument but to disregard it. It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been.

We come, then, to the crucial inquiry: Is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guaranty to the accused the right to such a trial? If the former, the question certified by the lower court must, without more, be answered in the negative.

Defendants strongly rely upon the language of this court in *Thompson* v. *Utah, supra,* at page 353:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

But this statement, though positive in form, is not authoritative. The case involved the validity of a statute dispensing with the common law jury of twelve and providing for trial by a jury of eight. There was no contention that the defendant, Thompson, had consented to the trial, but only that he had not objected until after verdict. The effect of an express consent on his part to a trial by a jury of eight was not involved—indeed he had been silent only under constraint of the statute—and what the court said in respect of that matter is, obviously, an *obiter dictum.*

Defendants also cite as supporting their contention two decisions of federal circuit courts of appeal, namely, *Low* v. *United States,* 169 Fed. 86; and *Dickinson* v. *United States,* 159 Fed. 801.

In the first of these cases the opinion, rendered by Judge Lurton, afterwards a justice of this court, definitely holds that the waiver of trial of a crime by jury involves setting aside the tribunal constituted by law for that purpose and the substitution by consent of one unknown to the law, and that this cannot be done by consent of the accused and the district attorney. "Undoubtedly," the opinion concludes, "the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void." This is strong language from a judge whose opinion is entitled to great respect.

In the second case, involving the completion of a trial by consent with a jury of eleven persons, substantially the same was held; but in a scholarly and thoughtful dissenting opinion, Judge Aldrich reviews the common law practice upon the subject antedating the Constitution, and in the course of his opinion, after referring to Article III, Section 2, and the Sixth Amendment, says (pp. 813-814, 820-821):

"The aim of the constitutional safeguards in question is a full, fair, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberty of accused parties. Whether the idea is expressed in words or not, as is done in some of the bills of rights and constitutions, a free and fair trial only means a trial as free and fair as the lot of humanity will admit.

"All will doubtless agree, at least the unquestioned authority is that way, that these protective provisions of the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty; or that his trial, in the event of trial, shall be held invalid for want of due process of law, based upon the ground that he was not confronted with his witnesses when he had waived that constitutional right and consented to the use of depositions; or because he had not had compulsory process for obtaining witnesses in his favor when he had waived that; or because he had not had the assistance of counsel when he had intelligently refused such constitutional privilege and insisted upon the right to go to trial without counsel; or upon the ground that he had not had a speedy trial when he had petitioned the court for delay; or that his

trial was not public when he had consented to, or silently acquiesced in, a trial in a courthouse with a capacity of holding only 12 members of the public rather than 1200.

"Beyond question, the right of an accused in a case like this to have 12 jurors throughout is so far absolute as a constitutional right that he may have it by claiming it, or even by withholding consent to proceed without that number, and doubtless, under a constitutional government like ours, the interests of the community so far enter into any incidental departure from that number, in the course of the trial, as to require the discretionary approval of the court, and that the proper representative of the government should join the accused in consent."

. . . . . .

"It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.

"There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized as involving innovation 'highly dangerous,' it would, as said by Judge Seevers in State *v.* Kaufman, 51 Iowa, 578, 581, 2 N. W. 275, 277, 33 Am. Rep. 148, 'have been much more convincing and satisfactory if we had been informed why it would be highly dangerous.'"

. . . . . .

"Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that in a very large sense the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties.

"In every substantial sense our constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused, and as such they may, in a limited and guarded measure, be waived by the party sought to be benefited."

The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of

government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it "the glory of the English law," nevertheless looked upon it as a "privilege," albeit "the most transcendent privilege which any subject can enjoy." Book III, p. 379. And Judge Story, writing at a time when the adoption of the Constitution was still in the memory of men then living, speaking of trial by jury in criminal cases said:

"When our more immediate ancestors removed to America, they brought this great *privilege* with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental *right*, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." 2 Story on the Constitution, § 1779.

In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for the trial of crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time. This is all the more remarkable when we recall the minute scrutiny to which every provision of the proposed Constitution was subjected. The reasonable inference is that the concern of the framers of the Constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative. That this was the purpose of the Third Article is rendered highly probable by a consideration of the form of expression used in the Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the original Constitution, is not to be regarded as modifying or altering the earlier provision; and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing; and this is the effect of the holding of this court in *Callan* v. *Wilson*, 127 U. S. 540, 549, where it is said:

"And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them."

Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement.

But the question remains whether the court is empowered to try the case without a jury; that is to say, whether Congress has vested jurisdiction to that end. We think it has, although some of the state, as well as some of the federal, decisions suggest a different conclusion.

By the Constitution, Article III, Section 1, the judicial power of the United States is vested in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish. In pursuance of that authority, Congress, at an early day, established the district and circuit courts, and by § 24 of the Judicial Code (U. S. Code, Title 28, § 41 (2)), the circuit courts having been abolished, expressly conferred upon the district courts jurisdiction "of all crimes and offenses cognizable under the authority of the United States." This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution. In the absence of a valid consent the district court cannot proceed except with a jury, not because a jury is necessary to its jurisdiction, but because the accused is entitled by the terms of the Constitution to that mode of trial.

Since, however, the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case. We are of opinion that the court has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury; and that jurisdiction to that end is vested by the foregoing statutory provisions. The power of waiver being established, this is the clear import of the decision of this court in *Schick* v. *United States*, 195 U. S. 65, 70-71.

"By section 563, Rev. Stat., [superseded by § 24, Judicial Code] the District Courts are given jurisdiction 'of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital.' There is no act of Congress requiring that the trial of all offenses shall be by jury, *and a court is fully organized and competent for the transaction of business without the presence of a jury.*"

See also *In re Belt*, 159 U. S. 95, and *Riddle* v. *Dyche*, 262 U. S. 333, both of which are out of harmony with the notion that the presence of a jury is a constitutional prerequisite to the jurisdiction of the court in a criminal case. The first of these cases involved the validity of an act of Congress authorizing waiver of a jury in criminal cases in the District of Columbia. The Court of Appeals of that District upheld the statute in *Belt* v. *United States*, 4 D. C. App. Cas. 25. Leave was asked of this court to file a petition for writ of *habeas corpus*. Upon this application, the question to be answered was (p. 97):

"Does the ground of this application go to the jurisdiction or authority of the Supreme Court of the District, or rather is it not an allegation of mere error? If the latter, it cannot be reviewed in this proceeding. *In re Schneider*, 148 U. S. 162, and cases cited."

After reviewing authorities, it was held that the Supreme Court of the District had jurisdiction to determine the validity of the act which authorized the waiver, and that its action could not be reviewed on *habeas corpus*.

In the second case, Riddle, on *habeas corpus*, assailed a conviction in a federal district court upon the ground that the jury was composed of only eleven men. This court held that the trial court had jurisdiction, and a record showing upon its face that a lawful

jury had been impaneled, sworn and charged could not be collaterally impeached. The remedy was by writ of error.

This conclusion in respect of the jurisdiction of the courts, notwithstanding the peremptory words of the Third Article of the Constitution, is fortified by a consideration of certain provisions of the Judiciary Act of 1789. That act was passed shortly after the organization of the government under the Constitution, and on the day preceding the proposal of the first ten amendments by the first Congress. Among the members of that Congress were many who had participated in the convention which framed the Constitution, and the act has always been considered, in relation to that instrument, as a contemporaneous exposition of the highest authority. *Capital Traction Company* v. *Hof, supra,* pp. 9-10, and cases cited. Section 9 of that act provides that "the trial of issues in [of] fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, *shall be by jury.*" Section 12 provides that "the trial of issues in [of] fact in the circuit courts *shall,* in all suits, except those of equity, and of admiralty, and maritime jurisdiction, *be by jury.*"

It will be observed that this language is mandatory in form, and is precisely the same as that of Article III, Section 2, of the Constitution. It is fair to assume that the framers of the statute, in using the words of the Constitution, intended they should have the same meaning; and if the purpose of the latter was jurisdictional, it is not easy to avoid the conclusion that the purpose of the former was the same. But this court has always held, beginning at an early day, that, notwithstanding the imperative language of the statute, it was competent for the parties to waive a trial by jury. The early cases are collected in a foot note to *Kearney* v. *Case,* 12 Wall. 275, 281, following the statement:

"Undoubtedly both the Judiciary Act and the amendment to the Constitution secured the *right* to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid."

The Seventh Amendment, which is here referred to, provides, in respect of suits at common law involving a value exceeding twenty dollars, that "the right of trial by jury shall be preserved"; and

it is significant that this language and the positive provision of the statute that "the trial of issues of fact . . . shall be by jury" were regarded as synonymous.

Another ground frequently relied upon for denying the power of a person accused of a serious crime to waive trial by jury is that such a proceeding is against public policy. The decisions are conflicting. The leading case in support of the proposition, and one which has influenced other decisions advancing similar views, is *Cancemi* v. *The People*, 18 N. Y. 128, 137-138. In that case Cancemi was indicted for the crime of murder. After a jury had been impaneled and sworn, and the trial begun, under a stipulation made by the prisoner and his counsel and counsel for the people, and with the express consent and request of the prisoner, a juror was withdrawn, and a verdict subsequently rendered by the remaining eleven jurors. On appeal a judgment based upon this verdict was reversed. The case was decided in 1858, and the question was regarded by the court as one of first impression. The following excerpt from the opinion indicates the basis of the decision:

"The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law' (Const., art. 1, § 6), when forfeited, as they may be, as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (vol. 4, 189) says: 'The king has an interest in the preservation of all his subjects.' . . . Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.

"Applying the above reasoning to the present case, the conclusion necessarily follows, that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated."

A decision flatly to the contrary, and one fairly representative of others to the same effect, is *State* v. *Kaufman*, 51 Iowa 578. The defendant there was indicted for forgery. Upon the trial, one of the jurors, being ill, was discharged with the consent of the defendant, and the trial concluded with the remaining eleven. There was a verdict of guilty. Upon appeal the verdict was upheld. The authorities upon the question are reviewed, and in the course of the opinion the court says (pp. 579-580):

"A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. This, it seems to us, effectually destroys the force of the thought that 'the State, the public, have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law.' The same thought is otherwise expressed by Blackstone, vol. 4, p. 189, that 'the king has an interest in the preservation of all his subjects.'

"It matters not whether the defendant is, in fact, guilty; the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the State may be deprived of the services of the citizen, and yet the State never actually interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar. The defendant may have consented to be tried by eleven jurors, because his witnesses were then present, and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they may

desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule."

Referring to the statement in the *Cancemi* case, that it would be a highly dangerous innovation to allow any number short of a full panel of twelve jurors and one not to be tolerated, it is said (p. 581):

"This would have been much more convincing and satisfactory if we had been informed why it would be 'highly dangerous,' and should 'not be tolerated,' or, at least, something which had a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used."

See also *State* v. *Sackett*, 39 Minn. 69, where the court concludes its discussion of the subject by saying (p. 72):

"The wise and beneficent provisions found in the constitution and statutes, designed for the welfare and protection of the accused, may be waived, in matters of form and substance, when jurisdiction has been acquired, and within such limits as the trial court, exercising a sound discretion in behalf of those before it, may permit. The defendants, having formally waived a juror, and stipulated to try their case with 11, cannot now claim that there was a fatal irregularity in their trial."

It is difficult to see why the fact, frequently suggested, that the accused may plead guilty and thus dispense with a trial altogether, does not effectively disclose the fallacy of the public policy contention; for if the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, *a fortiori* it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt. If he be free to decide the question for himself in the latter case, notwithstanding the interest of society in the preservation of his life and liberty, why should he be denied the power to do so in the former? It is no answer to say that by pleading guilty there is nothing left for a jury to try, for that simply ignores the question, which is not what is the effect of the plea? the answer to which is fairly obvious, but, in view of the interest of the public in the life and liberty of the accused, can the plea be accepted and acted upon, or must the question of guilt be submitted to a jury at all events? Moreover, the suggestion is wholly beside the point, which is, that public policy is not so inconsistent as to permit the accused to dispense with *every* form of trial by a plea of guilty,

and yet forbid him to dispense with a *particular* form of trial by consent.

The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

It may be conceded, at least generally, that under the rule of the common law the accused was not permitted to waive trial by jury, as generally he was not permitted to waive any right which was intended for his protection. Nevertheless, in the Colonies such a waiver and trial by the court without a jury was by no means unknown, as the many references contained in the brief of the Solicitor General conclusively show. But this phase of the matter we do not stop to consider, for the rule of the common law, whether exclusive or subject to exceptions, was justified by conditions which no longer exist; and as the Supreme Court of Nevada well said in *Reno Smelting Works* v. *Stevenson,* 20 Nev. 269, 279:

"It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails—*cessante ratione legis, cessat ipsa lex.*"

The maxim seems strikingly apposite to the question here under review. Among other restraints at common law, the accused could not testify in his own behalf; in felonies he was not allowed counsel (IV Sharswood's Blackstone, 355, Note 14), the judge in such cases occupying the place of counsel for the prisoner, charged with the responsibility of seeing that the prisoner did not suffer from lack of other counsel (Id.); and conviction of crime worked an attaint and forfeiture of official titles of inheritance, which, as Judge Aldrich points out (quotation *supra*), constituted in a large sense the reason for withholding from accused parties the right of waiver.

These conditions have ceased to exist, and with their disappearance justification for the old rule no longer rests upon a substantial basis. In this respect we fully agree with what was said by the Supreme Court of Wisconsin in *Hack* v. *State,* 141 Wis. 346, 351-352:

"The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that

no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demanded its meed of blood. Such a course raised up a sort of a barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted, but yet under the ordinary principles of waiver, as applied to civil matters, had waived every defect in the proceedings.

"Thanks to the humane policy of the modern criminal law we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not infrequently he is thus furnished counsel more able than the attorney for the state. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it."

The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy must be rejected as unsound.

It is not denied that a jury trial may be waived in the case of petty offenses, but the contention is that the rule is otherwise in the case of crimes of the magnitude of the one here under consideration. There are decisions to that effect, and also decisions to the contrary. The conflict is marked and direct. *Schick* v. *United States, supra,* is thought to favor the contention. There the prosecution was for a violation of the Oleomargarine Act (24 Stat. 209), punishable by fine only. By agreement in writing a

jury was waived and the issue submitted to the court. Judgment was for the United States. This court held that the offense was a petty one, and sustained the waiver. It was said that the word "crimes" in Article III, Section 2, of the Constitution, should be read in the light of the common law, and so read, it does not include petty offenses; and that neither the constitutional provisions nor any rule of public policy prevented the defendant from waiving a jury trial. The question whether the power of waiver extended to serious offenses was not directly involved, and is not concluded by that decision. Mr. Justice Harlan, in a dissenting opinion, after reviewing the authorities, concluded (p. 83) that "The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases."

Although we reject the general view of the dissenting opinion that a waiver of jury trial is not valid in any criminal case, we accept the foregoing statement as entirely sound. We are unable to find in the decisions any convincing ground for holding that a waiver is effective in misdemeanor cases but not effective in the case of felonies. In most of the decisions no real attempt is made to establish a distinction, beyond the assertion that public policy favors the power of waiver in the former but denies it in the latter because of the more serious consequences in the form of punishment which may ensue. But that suggested differentiation, in the light of what has now been said, seems to us more fanciful than real. The *Schick* case, it is true, dealt with a petty offense, but, in view of the conclusions we have already reached and stated, the observations of the court (pp. 71-72) have become equally pertinent where a felony is involved:

"Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right 'to be confronted with the witnesses against him . . . and to have the assistance of counsel.' Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."

In *Commonwealth* v. *Beard*, 48 Pa. Super. Ct. 319, the prosecution was for conspiracy, and there, as here, one of the jurors was discharged and the trial concluded with the remaining eleven. Judgment on a verdict of conviction was sustained. The court, after reviewing the conflicting decisions, was unable to find any good reason for differentiating in the matter of waiver between the two classes of crimes. We fully endorse its concluding words upon that subject (pp. 323-324):

"It surely cannot be true that the public is interested in the protection of an accused in proportion to the magnitude of his offending—that its solicitude goes out to the great offender but not to the small—that there is a difference in point of sacredness between constitutional rights when asserted by one charged with a grave crime and when asserted by one charged with a lesser one. Hence, when it is held in Schick *v.* U. S., 195 U. S. 65 (24 Sup. Ct. Repr. 826), that in trials for the lowest grades of offenses the accused may waive, not only the continued presence of the full number of jurors required to make up a jury, but the right to trial by jury, the only possible conclusion is that the purely theoretical element of public concern, as potential to override the accused's own free choice and render him effectually unfree even before conviction and sentence, cannot be regarded as in reality much of a factor in any case."

This view of the matter subsequently had the approval of the supreme court of the state in *Commonwealth ex rel. Ross* v. *Egan*, 281 Pa. 251. After noting the conflict of authority, and that a waiver has been held to be effective in a number of states which are named, it is there said (pp. 255, 256, 257):

"A defendant is supposed to understand his rights, and may be aided, if he so desires, by counsel to advise him. There are many legal provisions for his security and benefit which he may dispense with absolutely, as, for instance, his right to plead guilty and submit to sentence without any trial whatsoever."

. . . . . .

"The theory upon which the opposing cases are decided seems to rest on the proposition that society at large is as much interested in an impartial trial of a defendant, who may be sentenced to imprisonment, as he himself is, and therefore no permission to waive any right, when charged with a felony, should be accorded to him. There may be reason for applying this rule to capital cases, as has been done in Pennsylvania, but such a principle ought not to be invoked to relieve those charged with lesser offenses, such as larceny (though technically denominated a felony), from the consequences of their own voluntary act, and where it appears by the record that consent to the course pursued was freely given, the defendant should not be heard thereafter to complain."

. . . . . .

"The solution of the question depends upon the determination whether a trial by less than twelve is an irregularity or a nullity. If the latter be held, no sentence imposed may be sustained, but the contrary is true if the former and correct conclusion be reached. In the case of misdemeanors, the Superior Court has sustained the sentences where a voluntary waiver appeared: Com. *v.* Beard, supra. No real justification for a different decision in the case of felonies, not capital, can be supported."

See also *Commonwealth* v. *Rowe*, 257 Mass. 172, 174-176; *State* v. *Ross*, 47 S. D. 188, 192-193, involving a misdemeanor, but followed in *State* v. *Tiedeman*, 49 S. D. 356, 360, involving a felony.

In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

The question submitted must be answered in the affirmative.

It is so ordered.

Mr. Justice HOLMES, Mr. Justice BRANDEIS, and Mr. Justice STONE concur in the result.

The CHIEF Justice took no part in the consideration or decision of this case. Mr. Justice SANFORD participated in the consideration and agreed to a disposition of the case in accordance with this opinion.